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FOREWORD

The second edition of the American Bar Association Standards for Criminal Justice stands as a monument to the improvement of the truth-finding process in the adversary system. The Standards can be traced to 1963, when lawyers, professors, judges, and experts in the criminal justice system pooled their intellect to cause Standards to be promulgated for the administration of criminal justice. When the first edition was completed, the American Bar Association Standards were being measured against the Law Enforcement Assistance Administration National Advisory Commission Criminal Justice Standards and Goals. Implementation of both the American Bar Association Standards and the National Advisory Commission Standards brought an empirical reservoir of data into being that was utilized in preparing the second edition of the American Bar Association Standards. Today, the Standards for Criminal Justice have been cited by every state supreme court, the United States Supreme Court, and by nearly every district and circuit court in the federal judicial system.

The symposium which has been prepared for the Denver Law Journal is the culmination of a national effort to make the second edition of the Standards known to the legal profession and all those who work within the criminal justice system. Major General Kenneth Hodson and Lynn Edwards both played a key role in the preparation and implementation of the Standards for Criminal Justice. Professor B. James George is an authority on constitutional law and has written widely in the criminal law field. He is responsible for a great deal of the commentary which supports the Legal Status of Prisoner Standards. In small part, I was able to participate with the other authors both in the preparation and implementation of the Standards. The work which has been done to cause the Standards for Criminal Justice to be a model for use within the adversary system cannot be emulated better that it has been by the articles contained in this symposium.

DEPUTY CHIEF JUSTICE WILLIAM H. ERICKSON
Colorado Supreme Court
Chairman, American Bar Association
Committee to Implement the Standards
for Criminal Justice

THE AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: THEIR DEVELOPMENT, EVOLUTION AND FUTURE

KENNETH J. HODSON*

I. BACKGROUND

It would be difficult, even for members of the legal profession, to appreciate fully the scope and breadth of the American Bar Association (ABA) *Standards for Criminal Justice*[1] (*Standards*) without having at least a brief historical account of the *Standards'* creation and evolution. This portion of the Symposium is therefore devoted to a discussion of how, when, and why the

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* Major General, U.S. Army-Retired, former Judge Advocate General of the Army, former Chief Judge of the U.S. Army Court of Military Review, and former Executive Director of the National Commission to Review Federal and State Laws Relating to Wiretapping and Electronic Surveillance. The author was a member of the ABA special committee which developed the first edition of the ABA STANDARDS FOR CRIMINAL JUSTICE (1974), and he served in that capacity from the early planning stages in 1963 through the final approval of the first edition in 1973. He was the chairman of the Special and Standing Committees which prepared the second edition of those standards from 1975 through 1980. Much of the material in this article comes from his recollection of events occurring during this seventeen year period. During this same time, he served as Vice-Chairman, Chairman, and Secretary of the Criminal Law (later Criminal Justice) Section. He was a member of the ABA House of Delegates from 1971 to 1979.

The author acknowledges with thanks the major contribution of Mr. Richard P. Lynch to the preparation of those portions of this article dealing with the Criminal Justice Mental Health Standards Project. Mr. Lynch serves as the project director.

1. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980). In February 1981 the ABA House of Delegates approved the controversial new standards on the Legal Status of Prisoners, which will be added as Chapter 23 to the second edition by a supplement. Unlike the other chapters, the Legal Status of Prisoners standards were not developed originally by the Standing Committee. They were the product of the ABA's Joint Committee on the Legal Status of Prisoners. In 1978, the ABA House of Delegates referred the proposed standards to the Standing Committee and requested the Standing Committee to reconcile differences between the ABA draft standards and positions held by the American Correctional Association.

The chapters with their approval dates are listed below. The single digit number appearing in parentheses designates the task force which prepared the initial draft of the revisions. Chapter numbers omitted have been reserved for future standards.

1. Urban Police Function (February 1979) (4)
2. Electronic Surveillance (August 1978) (4)
3. Prosecution Function (February 1979) (2)
4. Defense Function (February 1979) (2)
5. Providing Defense Services (February 1979) (2)
6. Special Functions of the Trial Judge (August 1978) (1)
8. Fair Trial and Free Press (August 1978) (5)
10. Pretrial Release (February 1979) (2)
11. Discovery and Procedure Before Trial (August 1978) (4)
12. Speedy Trial (August 1978) (1)
13. Joinder and Severance (August 1978) (4)
14. Pleas of Guilty (February 1979) (2)
15. Trial by Jury (August 1978) (1)
18. Sentencing Alternatives and Procedures (August 1979) (1)
20. Appellate Review of Sentences (August 1978; amended February 1980)
21. Criminal Appeals (August 1978) (3)
22. Postconviction Remedies (August 1978) (3)
23. Legal Status of Prisoners (February 1981)

Standards came into being. Furthermore, it will analyze the impact which the *Standards* have had and assess their continuing potential for improvements in the administration of criminal justice in America.

The second edition of the *Standards* was published after the chapter on Sentencing Alternatives and Procedures was approved in August 1979 by the ABA House of Delegates. Sentencing Alternatives and Procedures was the last chapter of the first edition of the *Standards* to be revised. The House of Delegates' approval of that chapter completed a three-year effort to update the first edition by the ABA Standing Committee on Association Standards for Criminal Justice (Standing Committee). This comprehensive revision was mandated by the ABA's bylaws, which state that "[t]he Standing Committee on Association Standards for Criminal Justice . . . shall: (1) continuously review the Association's standards for criminal justice; (2) recommend such changes in, or additions to, those standards as it considers appropriate . . . ."[2]

The Standing Committee's mandate to update the *Standards* was but a continuation of an original ten year ABA project to develop standards for the criminal justice system. That ABA effort began in 1963 and was proposed by Professor Delmar Karlen who served as Director of the Institute of Judicial Administration located at New York University Law School.

The project began during the annual American Law Institute meeting held in May 1963 when the ABA, in conjunction with the Institute of Judicial Administration (IJA), proposed to undertake the formulation of "minimum standards" in the field of criminal justice. "The standards were born in a climate of deep concern over the burgeoning problems of crime and the correlative crisis in our courts occasioned by overwhelming caseloads, recidivism, and a seeming incapacity of the system to respond to the challenges of the Sixties."[3] As a result, the Criminal Law Section and the Judicial Administration Section each appointed one committee to consult with the IJA.[4]

In 1964, the IJA conducted a pilot study which was supervised by a committee composed of ABA members named by the Board of Governors, the Criminal Law Section and Judicial Administration Section. The committee determined that the proposed project was essential and viable. Subsequently, a twelve member special committee was appointed to coordinate the approved project. Initially, six advisory committees were appointed to focus on specific areas in which standards would be written. In 1969 a seventh committee was appointed to draft standards on the function of the trial judge. In August 1964, the ABA Board of Governors and House of Delegates approved the undertaking of the *Standards* project, which was funded by grants from the American Bar Endowment, the Avalon Foundation, and

2. ABA BYLAWS § 30.7.

3. Jameson, *The Beginning: Background and Development of the ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 255, 255-56 (1974) (quoting Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 NOTRE DAME LAW. 429 (1972)).

4. For a detailed discussion of the development of the *Standards* see Jameson, *supra* note 3.

the Vincent Astor Foundation.[5]

Initially, the phrase "minimum standards" was used. The word "minimum" was dropped because the special committee recognized that the standards were "more aptly described as desirable or acceptable rather than minimal."[6] Seventeen sets of standards were eventually developed and the House of Delegates approved these standards over a nine year period. Finally, in February 1973, the last set of standards was approved.[7]

The need for the first edition *Standards* was evidenced by the "challenges of the Sixties" previously mentioned. This challenge referred to the "criminal law revolution" of that decade which commenced with *Mapp v. Ohio*.[8] In the *Mapp* case, the United States Supreme Court extended a number of the United States Constitution's Bill of Rights protections to state and local actions. Prior to *Mapp*, those protections had largely been treated as restraints only on federal action.

Thus, *Mapp* signaled the downfall of the double standard which had prevailed in state and federal criminal cases. *Mapp*, and a swift succession of landmark cases, held that the fourteenth amendment made nearly all of the guarantees of the fourth, fifth, sixth, and eighth amendments binding on the states.[9]

Since the Court's rulings were limited to the specific issues of the individual cases, they frequently did not provide comprehensive guidance for reform. Moreover, there were wide differences of opinion within the legal community concerning their interpretation, impact, and implementation. The Warren Court was depicted as having unfairly tipped the scales in favor of the criminal. This opinion found support in the fact that the crime rate was rising at a much faster rate than the population. Clearly there was need for *practical* guidelines to assist legislators, judges, law enforcement personnel, practitioners, law schools, and the public in bringing state criminal justice systems into conformity with the increasing number of sweeping Supreme Court decisions. The system, in short, had to be updated.

This environment prompted Professor Karlen to propose that the ABA undertake the development of criminal justice standards. He and his colleagues were aware of the success of an earlier ABA program to promulgate standards for judicial administration in civil cases. These same factors nurtured the ABA's interest in undertaking the project and carrying out one of the ABA's primary purposes: "to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions."[10]

The pilot committee and the special committee recognized that scholarly essays, no matter how erudite, would not suffice as standards. The stan-

5. *Id.* at 256-57.
6. *Id.* at 258.
7. *Id.*
8. 367 U.S. 643 (1961).
9. The Supreme Court rulings virtually mandated that the states examine and revise their criminal law procedures because when state procedures failed to conform to the Court's decisions, corrective action became necessary.
10. ABA CONST. art. 1.2.

dards needed to be practical, useful, and credible to legislatures, courts, the legal profession, law schools, and the public. Achieving these goals was crucial; otherwise, the project would not be worthwhile. Chief Justice Burger actively participated in the achievement of these goals as chairman of an advisory committee and later, as chairman of the special committee. Judge William J. Jameson, United States Senior District Court Judge, United States District Court for the District of Montana, succeeded Chief Justice Burger (who had succeeded Chief Judge J. Edward Lumbard, Chief Judge of the United States Court of Appeals for the Second Circuit) as chairman of the special committee and completed the project.[11]

During the early stages of the project, the pilot committee and the special committee defined the project's scope, and developed an organizational structure, method of operation, and general format for the *Standards*. To promote uniformity of approach in the preparation of the *Standards* and to minimize overlap and duplication, a joint meeting of the special committee and the chairmen and reporters of the advisory committees preceded implementation of the project. A portion of that meeting was devoted to an exposition by Herbert Wechsler, Director of the American Law Institute, on the manner in which the American Law Institute (ALI) Restatements had been formulated. Although the participants agreed that the ALI approach generally would be followed in the development and format of the *Standards*, they enunciated one philosophical difference: the ALI Restatements were not aspirational but rather reflected the actual state of the law. The ABA project would take a different tack. In view of the wide disparities existing in criminal procedure, and, in many instances, an absence of any recognized practice or rule, the committee decided the *Standards* should promulgate rules of practice and procedure that would serve as minimally acceptable standards in a fair system of criminal justice. Thus, the ABA *Standards* would do more than report what the law "was"; they would suggest what the law "should be." This philosophy was later refined by deleting the term "minimum" in favor of standards that were "desirable and acceptable." The test for each pro-

11. Chief Justice Burger, whose participation in the *Standards* project continued until his confirmation as Chief Justice of the United States Supreme Court, described the project in this manner:

> This project represents, I believe, the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history. The Standards represent more than 10 years of intense work, study, and debate by more than 100 of the nation's leading jurists, lawyers, and legal scholars operating in advisory committees of 10 or 12 each. The participants were drawn from every part of the country and included state and federal judges, prosecuting attorneys, defense lawyers, public defenders, law professors, penology experts and police officials. In addition, the active participants consulted with scores of other interested and knowledgeable individuals in the criminal justice field for their advice and assistance. As a result, the Standards reflect the richest reservoir of experience ever developed concerning the functioning of our criminal justice system. The caliber of the participants is illustrated in the fact that one advisory committee with a membership of 12 embraced a total of some 400 years of intensive exposure to work in the courts and the criminal system. In sum, this project was much more than a theoretical and idealistic restatment of the law, but rather a synthesis of the experience of a diverse and highly experienced group of professionals.

Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251-52 (1974).

posed standard would be whether that standard afforded protection for society as well as for the individual defendant's constitutional rights.

The manner in which the advisory committees approached their tasks varied. In cases where law and practice were reasonably well established, as in Pleas of Guilty, the reporter, after one or more preliminary sessions with his committee, would propose black letter standards and supporting memoranda for the committee's consideration and review. In areas where no recognized "standard" of practice or procedure existed, the advisory committee devised a different approach. In developing the standards on the Prosecution and Defense Functions, for example, the advisory committee, under the chairmanship of then Judge Burger, conducted detailed interviews of experienced prosecutors and criminal defense counsel to find out what practice they followed in a variety of factual situations arising before, during, and after criminal trial. Thereafter, the advisory committee and the reporter developed proposed standards reflecting the consensus of views from these "expert witnesses" and offered their findings as standards.

While still in the planning stage, the pilot and special committees decided not to duplicate on-going projects of other organizations. Consequently, the advisory committee on the Police Function delayed action on its assigned standards of the Urban Police Function pending completion of the ALI's Model Code of Pre-Arraignment Procedure.[12] The special committee also decided that it would not attempt to duplicate the ALI's Model Penal Code or the Model Code of Evidence. Finally, the committee decided that it would confine itself generally to adult offenders in the criminal process, from the first contact with the police through sentencing, appeals, and postconviction remedies. Therefore, the committee did not attempt to develop standards relating to juvenile justice.[13]

In preparing several of the standards, specially qualified consultants

12. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975). The ALI Model Code offers a set of specific rules covering the criminal process from the first contact of a police officer with a suspect through arrest, police custody, investigation, early court appearance, and plea. Its 121 sections include detailed rules relating to such difficult and controversial issues as stop-and-frisk, line-ups, search and seizure, preliminary hearings, and plea bargaining. The ABA Standards on the Urban Police Function do not overlap or duplicate the ALI Model Code. To the contrary, the Urban Police Function provides policy recommendations, rather than specific rules of conduct to be followed by individual police officers. The standard attempts to define the scope of the police function by identifying the principal objectives and responsibilities of police departments. It gives lengthy consideration to the need for providing the police with adequate resources. The standard also places a high priority on the formulation of administrative rules to govern the exercise of police discretion, particularly in the areas of selective enforcement, investigative techniques, and enforcement methods. In addition, the standard recognizes the need for control over police authority and recommends various methods of review. In short, the standard establishes broad policies for consideration by the police, legislatures, lawyers, and other public groups which helps determine how the police department should be organized and how it can efficiently carry out its broad range of functions.

13. Juvenile justice standards were later developed by the Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, under the chairmanship of Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit. IJA-ABA JT. COMMISSION ADMINISTRATION OF JUVENILE JUSTICE (1980). The ABA House of Delegates approved seventeen of these standards in February 1979; three additional standards were approved in February 1980. The twenty volume edition of the juvenile justice standards was published in 1980.

were called upon to provide advice with respect to matters outside the general knowledge of the members of the advisory committees. For example, career police officers, including representatives of the International Association of Chiefs of Police, provided expert guidance in the preparation of the standards on the Urban Police Function and Electronic Surveillance. Similarly, experienced probation officers assisted significantly in the drafting of the standards on probation. Members of the media provided valuable input for the standards on Fair Trial and Free Press.

When the special committee and its advisory committees and reporters had completed a first tentative draft of the black letter standards, those standards and their supporting commentary were printed. More than 12,000 copies were distributed throughout the ABA and its affiliated organizations for review, comment, and critical analysis. The refined drafts were then submitted for action to the ABA Board of Governors and House of Delegates. The latter entity consists of some 350 members representing the ABA's more than 260,000 members and affiliated organizations. As noted earlier, all seventeen sets of the *Standards* were ultimately approved by the House of Delegates, and became official ABA policy.[14]

It was not enough, however, to develop and publish useful and practical standards. The ABA's approval could not guarantee that the *Standards* would have significant impact upon the administration of criminal justice.

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14. Since I participated in the project from the time it was proposed in 1963 until it was completed ten years later, I feel that some special mention should be made of those who contributed significantly to its success, even at the risk of omitting mention of others who devoted so much of their time to it. The three chairmen provided inspirational leadership (Chief Judge Lumbard—1936-1968; Chief Justice (then Judge) Burger—1968-1969; and Judge Jameson—1969-1973). The members of the special committee and its advisory committees included seven members who were or would be presidents of the ABA, and two other former or future ABA presidents who were active in the planning and fund-raising (Whitney North Seymour and the late Orison S. Marden). Four members would ascend to the Supreme Court of the United States. In addition to Justice Powell (then a practicing lawyer) and Chief Justice Burger (then a United States Court of Appeals Judge), two of the advisory committees included Abe Fortas and Harry A. Blackmun, both of whom were later appointed Associate Justices of the Supreme Court.

Chief Judge Lumbard, however, as chairman of the pilot and special committees during the early years of the project, stands out as the individual who bore the heaviest burden in developing the operational concept, defining the scope of the project, and moving it forward in a timely and effective manner. He was ably assisted by Professor Karlen and by Richard A. Green, a former assistant U.S. Attorney, who conducted the pilot study and who served as full-time project director once the project was approved.

Justice Lewis F. Powell, Jr., as ABA President-Elect (1963-1964) and as President (1964-1965), participated actively in devising the organizational structure of the special committee and its advisory committees. Because of his strong belief in the value of the project and his position as ABA President, Justice Powell was able to convince busy and highly qualified lawyers and judges to give of their time and energies to serve as members of the special committee and its advisory committees. He also served as an active member of the special committee until 1972 when he was sworn in as Associate Justice of the Supreme Court.

Funding was essential to the success of the project. The American Bar Endowment was encouraged to fund the pilot project and to allocate an additional $250,000 for the project itself. This was accomplished through the efforts of then ABA President Powell who was strongly assisted by former ABA Presidents Judge Walter Craig and Judge William Jameson. Special committee member David W. Peck, a practicing lawyer in New York City and a former New York Supreme Court Judge, headed the effort to seek other funds. He was singularly successful in swiftly obtaining $250,000 in project funding from both the Avalon and the Vincent Astor Foundations.

During the period when the ABA's *Criminal Justice Standards* were being formulated, the President's Commission on Law Enforcement and Administration of Justice, the National Commission on Civil Disorders, and the National Commission on the Causes and Prevention of Violence had been created. Yet, no meaningful effort had been made to carry out the comprehensive findings and recommendations of those bodies. Their recommendations languished on library shelves.

The late Louis B. Nichols, then chairman of the ABA Criminal Law Section, was aware of the national commissions' lack of significant impact on the criminal justice system. Therefore, in 1968 he proposed that the Criminal Law Section make a long-range commitment for a nationwide implementation of the ABA *Criminal Justice Standards*, except for the standards relating to Fair Trial and Free Press. These standards were to be the responsibility of a special subcommittee of the ABA's Standing Committee on Public Relations, and later the Standing Committee on Association Communications. The ABA Board of Governors approved the Nichols proposal and the section embarked on an ambitious, successful ten year implementation program to put the *Standards* in the market place.

The section was fortunate to obtain the volunteer services of retired United States Supreme Court Associate Justice Tom C. Clark as chairman of the implementation committee. He was a tremendous asset and he continued to head the committee until his untimely death in June 1977. Colorado Supreme Court Justice William H. Erickson, who had served as deputy chairman and had been actively involved with the *Standards* and their implementation, succeeded Justice Clark as chairman. Justice Erickson continues to chair the implementation activities and he has carried on Justice Clark's tradition with energy and imagination.

The implementation program involved careful planning, large-scale fund raising from private and governmental sources, recruiting and training of staff, distribution of more than 1,800,000 copies of the individual paperback *Standards*, and organizing volunteers from both local and national levels. The program also included all branches of the government, as well as religious, labor, professional, and civic groups.[15]

After the House of Delegates approved the last two sets of the first *Standards* in 1973, Chesterfield Smith, then ABA President, appointed eight members to a new committee, the Special Committee on the Administration of Criminal Justice, and designated Justice William H. Erickson as chairman. This new committee was charged with monitoring the existing *Standards* to determine the need for revision and for additional standards.

During the first several years of its work, the new committee reviewed all 476 black letter standards in the light of subsequent United States Supreme Court opinions and other developments in the criminal justice system. The review commended the classic composition and painstaking craftsmanship that went into the *Standards*; no major deficiencies or drastic need

15. The entire implementation process functioned under the guidance of H. Lynn Edwards, then the ABA Staff Director of the Criminal Law Section.

for amendments were revealed. The new committee concluded, however, that such landmark Supreme Court decisions as *Argersinger v. Hamlin*,[16] *Gagnon v. Scarpelli*,[17] and *Morrissey v. Brewer*[18] called for several clarifying and substantive amendments to the existing black letter standards.

Changes in black letter standards, with supporting commentary, were prepared, but action to submit them to the House of Delegates for approval was withheld for several reasons. First, the amendments would be of little utility to the implementation effort unless there were means to make them available to the holders of the original *Standards* which had been distributed nationwide. Even if the mailing lists could be located and brought up to date, budgetary limitations alone would have prevented such a distribution.

Second, by the mid-1970's, several other "standards" affecting criminal justice procedure appeared, including the Uniform Rules of Criminal Procedure of the National Conference of Commissioners on Uniform State Laws,[19] the ALI Model Code of Pre-Arraignment Procedure,[20] and the revised Federal Rules of Criminal Procedure[21] promulgated by the United States Supreme Court.

The ABA Criminal Justice Section, under the chairmanship of Alan Y. Cole, made a comprehensive analysis of these "standards" and compared them with the ABA *Standards for Criminal Justice*. Although the analysis identified conflicts between the ABA *Standards* and the other four publications, it did not conclude which of the competing standards established the best practice or procedure. Thus, the ABA's implementation effort was significantly affected by a plethora of conflicting standards.

The second edition of the *Standards* attempts to eliminate this confusion. Not all conflicts, however, have been eliminated because the task forces and the Standing Committee did not always agree with the provisions of other

16. 407 U.S. 25 (1972). In *Argersinger*, the Court concluded that the sixth amendment forbids imposing a prison or jail sentence on an indigent who has not been afforded the right to counsel. Standard 4.1 of the first edition of the standards on Providing Defense Services required assistance of counsel in all cases punishable by loss of liberty "except those types of offenses for which such punishment is not likely to be imposed." This provision left open the possibility that a prison or jail term might be imposed even though the defendant was not afforded the right to counsel. Standard 5-4.1 of the second edition now provides that counsel is to be provided in all cases where the offense charged is punishable by imprisonment.

17. 408 U.S. 471 (1972). In *Gagnon*, the Court outlined due process requirements for the revocation of probation, and included the right to counsel in certain situations. Included in these procedures was a requirement for a two-stage procedure, namely, a preliminary hearing to determine whether there was a violation of parole or probation provisions, and a final hearing to consider not only this fact question, but if there was a violation, what to do about it. Standard 5.4 of the first edition of the standards on Probation had not clearly spelled out that a two-stage procedure was required, nor did it address the question of right to counsel. Standard 18-7.5 of the second edition included all of the due process requirements of Morrisey v. Brewer, 408 U.S. 487 (1972), and *Gagnon*, plus the right to counsel in all cases. *Standards*, *supra* note 1, § 18-7.5. Although this standard deals only with revocation of probation, it seems clear that revocation of parole should follow the same procedures.

18. 408 U.S. 487 (1972). In this case, the Court established detailed due process requirements for the revocation of parole.

19. NATIONAL CONFERENCE OF COMMISSIONERS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS, UNIFORM STATE LAWS, UNIFORM R. CRIM. P. 412 (1974).

20. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975).

21. 18 U.S.C. § 3001 (1976).

standards, goals, and codes. The Standing Committee adopted the policy of citing applicable portions of related standards after each boldface standard. Further, the commentary to the *Standards* discusses any conflict and the rationale for the adoption of the ABA standard when there was a conflict with any of the related standards. In many cases the reporters drew extensively on the provisions of related standards in revising the first edition. This was particularly true with the Uniform Rules of Criminal Procedure. In adopting this policy of citing and discussing the related standards, the Standing Committee intended to provide maximum guidance to legislatures and courts of various jurisdictions in adopting their own code or rules of criminal procedure.

It was impossible to maintain the credibility and the utility of the first edition of the ABA *Standards* through piecemeal amendment, without assurance that such amendments would find their way to the users. Moreover, the presence of competing and conflicting standards convinced the committee that it should seek funds for a comprehensive revision of the original *Standards*. These factors were buttressed by the fact that ten years had elapsed since the original ABA *Standards* had been prepared. In addition, the impact of Supreme Court decisions and new competing standards created a need to assess the first edition's impact with data gained from such experiments as pretrial release projects, speedy trial statutes and court rules, public defender offices, and police legal adviser units.

II. CREATING THE SECOND EDITION

In December 1976, the Special Committee on the Administration of Criminal Justice obtained Phase I funding from the Law Enforcement Assistance Administration (LEAA). Matching funds also were provided by the American Bar Endowment.[22] By the time the Standing Committee on Association Standards for Criminal Justice was officially established, many of the preliminary tasks of the updating project were well underway. A core staff, task forces, and reporters had been recruited and oriented, and were ready to function under the policy direction of the nine-member Standing Committee. The Standing Committee had a balanced composition of defense, prosecution, and judiciary representatives. The membership of each of the five task forces appointed by the Standing Committee had a similar composition. The ABA Adjunct Committee on Fair Trial and Free Press, then operating under the ABA Standing Committee on Association Communications, served as a special task force to review and recommend changes in the standards relating to Fair Trial and Free Press.

The task forces and reporters exercised wide discretion in carrying out their assignments. A Standing Committee ground rule required one advocating a change in a black letter standard to satisfy the Standing Committee that the change was necessary. This rule was established in part to ensure that the Committee fulfilled its duties by recommending necessary changes

22. Phase II funding necessary to complete the updating project was also a combination of LEAA discretionary funds and matching grants from the American Bar Endowment.

in or additions to the *Standards*, including changes needed to keep pace with constitutional amendments, Supreme Court decisions, new ABA policies or developments in criminal justice. The rule was formulated principally because the original *Standards* had proven their worth and established their credibility in the marketplace. The rule therefore ensured that the *Standards* would be modified only when necessary and desirable.

Some of the first edition *Standards* were not changed at all, many only slightly modified, and a number substantially altered. The changes depended on what had happened in the past ten years, what each task force believed the present national norm should be, and what stylistic changes were deemed appropriate.

The Standing Committee was determined to eliminate overlap and duplication within the second edition. The first edition was conceived and executed as a compendium of individual standards volumes, drafted over a period of some nine years. Each volume underwent lengthy circulation in tentative draft form for comment and feedback. This was followed by refinement, presentation to the Board of Governors and House of Delegates, debate, approval, and finally publication. Despite the circulation process, the first edition contained a degree of overlap, duplication, and in some instances inconsistencies.[23] The committee attempted to "purge" these duplications and inconsistencies in the second edition.[24]

Because of the tight deadlines established by the LEAA in granting funds for the project, it was clear that the second edition could not afford the lengthy post-preparation review that played such an important role in the

23. An example of inconsistency is found in the volumes relating to Pleas of Guilty and the Function of the Trial Judge on the question of judicial involvement in plea negotiations.

24. It was not always possible to eliminate all inconsistencies. The House of Delegates acted on each chapter of the *Standards* separately and on one occasion, its action resulted in an inconsistency, in philosophy at least, between the standards on Sentencing Alternatives and Procedures and those on Appellate Review of Sentences. In August 1978, the House of Delegates approved the latter standards, including provisions permitting the government to appeal an excessively low sentence and the accused to appeal an excessively high sentence. However, in February 1980, the Section of Corporation, Banking and Business Law recommended that the House delete the provision permitting government appeals of low sentences. This recommendation was based partly on policy, and partly on the holding of the United States Court of Appeals in United States v. DiFrancesco, 604 F.2d 769 (2d Cir. 1979), *rev'd*, 449 U.S. 117 (1980). The court of appeals held that government appeals of unjustly light sentences under 18 U.S.C. § 3576 (1976) violated the double jeopardy clause of the United States Constitution. *See* Ad Hoc Committee of Federal Criminal Code, *Report on Government Appeal of Sentences*, 35 BUS. LAW. 617 (1980) for a full report of the Section's position. The House approved this recommendation, and the provision permitting government appeals was deleted from the standards on Appellate Review of Sentences. Between these two actions of the House, however, the House had, in August 1979, approved the standards on Sentencing Alternatives and Procedures, which contained provisions for an agency to establish sentencing guidelines for judges. The philosophy underlying these provisions was that sentences which fell below the guidelines could be appealed by the government; if above the guidelines, the accused could appeal. This philosophy was consistent with the 1978 action of the House approving the standards on Appellate Review of Sentences, including the provision for government appeals. It is, however, inconsistent with the 1980 House action deleting the provision for government appeals. It should be noted that the Supreme Court subsequently reversed the decision of the court of appeals, United States v. DiFrancesco, 449 U.S. 117 (1980), and supported the position of the task force and Standing Committee that government appeal of sentences in such cases did not violate the double jeopardy clause.

first edition. Recognizing the value of participation by national organizations interested in criminal justice improvement, the Standing Committee announced its willingness to accept input at the outset. More than fifty organizations accepted the committee's invitation,[25] and some sent representatives to meetings of the Standing Committee and its task forces. Other groups, particularly those with large constituencies of ABA members as well as specialized ABA sections and divisions, created special committees of their own to examine the Standing Committee's recommendations. In somes instances, these groups invited persons associated with the updating efforts to meet with them as they considered areas of the *Standards* germane to their organizations' interests. Participation by these groups was a valuable part of the project, and enabled the Standing Committee to meet the deadlines imposed by the grant.

After the task forces had agreed on necessary changes, including textual revisions of commentary to reflect primary and secondary authorities, the drafts were then presented to the Standing Committee and ultimately to the ABA House of Delegates. Each entity made the additional changes it deemed appropriate. Ten of the revised sets of *Standards*, "chapters" in the second edition terminology, were approved by the House of Delegates in August 1978, six in February 1979, and the last one, Sentencing Alternatives and Procedures, which incorporated the revised standards on probation, in August 1979.[26]

Though changes were made during the revision, the significant change in the format of the second edition is described in the introduction:

> [T]he second edition is a multivolume loose-leaf compendium with the sets of standards arranged as numbered chapters approximating the sequential order in which a case would proceed through the criminal justice system—from the initial role of the police through final postconviction remedies. Unlike the first edition, this loose-leaf compendium will be periodically updated by supplements as dictated by significant court decisions, important or widespread statutory changes or changes in ABA policy. . . .[27]

The ABA hopes that the second edition will have a significant impact on the law. The New York Times noted the success of the implementation effort: "In criminal law the Association's publication of Standards Relating to the Administration of Criminal Justice [has] had an enormous impact on the development of the law."[28] There are some concrete illustrations which justify the Times' assessment:

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25. Some of the organizations that attended were: the National District Attorneys Association, the National Legal Aid and Defender Association, the American Probation and Parole Association and the National Conference of Commissioners on Uniform State Laws.

26. *See* note 1 *supra*.

27. *Standards*, *supra* note 1, introduction at xvii-xviii. The second edition consists of a three part format: (1) *History of Standards*, which contains the changes between the first and second edition; (2) *Related Standards*, which provides a list of other nationally approved standards; and (3) *Commentary*, which provides a current discussion of pertinent case law and statutory developments. *Id.*

28. Goldstein, *American Bar Association is More or Less Influential*, N.Y. Times, November 20, 1977 § 4, at 16, col. 4.

1. As of March 1981, according to Shepard's Criminal Justice Citations, the *Standards* have been cited more than 8,900 times by the United States Supreme Court, federal courts, military courts, and appellate courts in every state.[29]
2. As of May 1980, thirty-six states had revised their criminal codes, while four states, the District of Columbia, and the federal government had drafted revisions, three states were planning revisions, and six states had drafted revisions which had been aborted. Criminal code revision has been stressed as the means of implementing the *Standards*, and the ABA *Criminal Justice Standards* were widely used in the revision efforts.[30]
3. Every state has followed the implementation committee's recommendation to conduct a comparative analysis of state criminal justice procedures in relation to the 476 policy recommendations of the first edition black letter ABA *Standards*.[31] The analysis enabled each state to set priorities and goals consistent with budgetary resources for overhauling its procedures.

Whether the second edition will fare as well in the marketplace as its first edition predecessor will depend, in large part, on the efforts of the Standing Committee. The Standing Committee, with the approval of the Criminal Justice Section, was given the responsibility for all *Standards* implementation activities. With the sharp reduction of discretionary funds available from the LEAA, it is clear that the extensive and expensive first edition implementation effort cannot be duplicated. There is, however, reason to believe that such a costly effort will not be necessary.

Operating within its limited budget, the Standing Committee, working through its Adjunct Committee on Implementation chaired by Deputy Chief Justice Erickson, has taken steps to ensure that the second edition does not languish on library shelves. For example, complimentary copies of the four volume second edition were presented to the Chief Justice of each State Supreme Court by the ABA State Delegate. Pictures of the presentation ceremonies with explanatory stories appeared in many State Bar Journals and newsletters. This program, guided jointly by the Standing Committee and the Adjunct Committee on Implementation, ensured that both the judiciary and the lawyers in each state became aware of the new second edition. The Standing Committee is also encouraging the editors of leading law reviews to publish articles about the *Standards*. This special Symposium Issue of the *Denver Law Journal* is a prime example of how the second edition can be brought to the attention of the legal profession.

Each jurisdiction must decide in what manner it will implement these *Standards*, and to what degree. A jurisdiction can translate the *Standards* into legislation and/or rules of court. The jurisdiction may also encourage its judicial officers to use the *Standards* in deciding cases. These and other methods have been used in varying degrees in implementing the first edition of the *Standards* in all states and in the federal system.

29. 6 Shepard's Criminal Justice Citations (Mar. 1981).
30. Records of the ABA Standing Committee on Association Standards for Criminal Justice, 1800 M Street, N.W., Washington, D.C.
31. *Id.*

The judiciary's use of the *Standards* is the most effective and persuasive implementation model. When courts cite the *Standards* they not only recognize their utility, but they also implicitly encourage lawyers to employ the *Standards* in preparing their cases and briefs. Thus, the ABA's distribution of copies to the appellate courts should reap significant benefits.

The second edition preserves the guiding philosophy of the first edition, a philosophy tested and proven over more than a decade of nationwide implementation. The philosophy dictates that the *Standards* in the second edition are neither model codes nor rules, and hence are not drafted in such language. Rather, they are guidelines and recommendations for legislatures, courts, and practitioners. The *Standards* are action-oriented, practical guidelines, targeted at achieving a criminal justice system that is fair, balanced, and constitutionally responsive to contemporary and future needs.

Continuous evaluation, adjustment, and change are vital characteristics of a criminal justice system which effectively accommodates the dynamics of growth and cultural evolution. The first edition formulated standards to serve criminal justice needs as those needs were then perceived. In the intervening years, changes emerged which warranted additional review and development work. During the mid-1970's, the Special Committee monitoring the *Standards* pinpointed several areas that justified the development of new standards. One of these areas, the Legal Status of Prisoners, was presented to the House of Delegates in February of 1981.

Plans for the development of several other standards chapters have been approved by the Standing Committee, among them Urban Police Function Part II (police discretion and the use of force) and the Charging Function (prosecutorial discretion, including the grand jury). Full action to develop these standards will be undertaken when project funding becomes available. These new standards, like the Legal Status of Prisoners, will take their place as full chapters in the second edition upon approval by the House of Delegates.

Another burgeoning area of the law requiring attention, mental health issues in criminal law, has become a major Standing Committee project and ABA Criminal Justice Mental Health Standards will therefore be developed.

III. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS PROJECT

For many years the American Bar Association has maintained an interest in the field of mental health and its relationship to the law. The mentally retarded, the mentally disabled, and the mentally diseased present special problems for those charged with the administration of both civil and criminal law. Moreover, citizens who suffer from various forms of mental defect have special legal needs. The ABA's interest in the field of mental health was emphasized with the 1961 publication of the Mentally Disabled and the Law by the American Bar Foundation.[32] That major study devoted a full chapter to the subject of mental disability and the criminal law. Since its

32. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW (1961).

original publication in 1961, the study has been updated and the American Bar Foundation is now in the process of producing yet another revision.

Building upon the substantial research done by the American Bar Foundation, the ABA created a Special Commission on the Mentally Disabled in 1973. This fifteen-member commission is charged with the responsibility for the review and evaluation of existing studies and materials on the subject of mental disability.[33] The Commission publishes the Mental Disability Law Reporter, a bi-monthly publication which provides comprehensive coverage of all important issues in the rapidly expanding fields of mental disability and developmental disability law. In 1977 and 1978, two special issues of the Mental Disability Law Reporter were devoted to the publication of a series of articles dealing with a host of major criminal justice issues in the mental health field. Those special articles dealt with incompetency to stand trial on criminal charges, the insanity defense, mental health services for prisoners, and civil commitment.[34]

The birth and operation of the ABA's Commission on the Mentally Disabled occurred during the time when the ABA was engaged in a massive effort to update the first edition of the *Standards*. For the most part those standards and the revised second edition remain silent on the major mental health issues which cause continuing perplexity for all participants, actors, and institutions engaged in the administration of criminal justice. While some chapters of the second edition *Standards* make reference to mental health matters,[35] the treatment these matters are accorded is minimal. For some time the Standing Committee and its predecessor entities had recognized the need to promulgate proposed criminal justice mental health standards for consideration by the ABA's House of Delegates. Nonetheless, a comprehensive undertaking in this relatively uncharted area of the criminal law was not possible while the Committee's energies were being devoted to the major updating project. For all practical purposes that updating project was completed in 1979 and, at that time, the Standing Committee began work on the development of a plan to undertake a comprehensive criminal justice mental health standards development program. A detailed and comprehensive project proposal was developed, and in February 1981 the Criminal Justice Mental Health Standards Project began in earnest. The project's first phase is a fifteen-month effort which will end on April 30, 1982, and its goal is to produce by that date "provisional" black letter standards in six specific areas: 1) police encounters with mentally disabled persons; 2) incompetency to stand trial; 3) nonresponsibility for crime; 4) special dispositional statutes and mentally disabled convicts; 5) civil commitment of prosecuted persons; and, 6) an examination of ethical and other guidelines governing the role of psychiatrists, psychologists, and other mental health professionals in the criminal process. Each of the areas falls under the scru-

33. AMERICAN BAR ASSOCIATION POLICIES AND PROCEDURES HANDBOOK 30 (1980-81).

34. 2 MENTAL DISABILITY L. REP. 57-159, 615-78 (1977-78).

35. *See Standards*, *supra* note 1, ch. 1 (Urban Police Function); ch. 3 (Prosecution Function); ch. 4 (Defense Function); ch. 10 (Pretrial Release); ch. 11 (Discovery and Procedure Before Trial); ch. 14 (Pleas of Guilty); ch. 15 (Trial by Jury); ch. 18 (Sentencing Alternatives and Procedures); and ch. 21 (Criminal Appeals).

tiny of one of the project's six task forces. Each task force is chaired by a member of the Standing Committee and is served by a legal reporter and an interdisciplinary membership.

The project operates under policy guidance of the ABA's nine-member Standing Committee on Association Standards for Criminal Justice, and is financed by a grant from the John D. and Catherine T. MacArthur Foundation. Six task forces have been assigned discrete jurisdictional areas. Those areas and the key issues under examination within those areas are discussed below.

Task Force One

This task force has been assigned the topic of police encounters with mentally disabled persons. That title perhaps fails to do justice to the full scope of this task force's inquiry. Key issues under consideration by the Police Task Force include: the extent to which explicit statutory authority should grant police agencies express powers to detain mentally disturbed persons, the specific criteria which must be met before police may take an individual into custody because of mental illness, the extent to which aberrant behavior which is non-criminal, or, if criminal, merely disorderly, should result in a non-custodial resolution, and the extent to which the custody of mentally ill law breakers should fall under the civil rather than the criminal law. The Police Task Force will also examine desirable training criteria—at least for large urban police departments—designed to provide officers with the requisite background to enable them to recognize and cope with the mentally ill in emergency situations.

Because of police response to mental health emergencies, the task force will also consider the requisite characteristics of an emergency reception center and the services that should be offered to persons referred to the center by police. Finally, Task Force One will examine the extent to which police officers would be provided with immunity from civil liability resulting from their good faith actions in emergency mental health situations.

Task Force Two

Task Force Two has been assigned the topic of incompetency to stand trial. This will be one of the project's most complex areas of inquiry. In essence, Task Force Two will examine all issues relating to the question of a defendant's competency or fitness to stand trial for the crime with which that defendant has been charged.

First, Task Force Two will examine the responsibility of various parties to the proceedings to raise the issue of competency. For example, the task force will examine the ethical problems faced by both the defense and prosecution in raising the competency issue. Under certain circumstances, for instance, a defense attorney may decide that his client is in fact incompetent, but nonetheless determine that a trial on the merits, as opposed to a competency hearing, is in the client's best interest.

Second, the factual bases to be utilized by the court in ordering a com-

petency examination will be considered. The task force will attempt to draft a specific standard setting forth the criteria which should be used by the court in determining the need for a diagnostic competency examination. A host of issues will face the task force in this inquiry. For example, must a defendant be committed or would a less restrictive bail procedure enable a competency examination to take place on an out-patient basis? The task force will also study issues regarding requisite qualifications of competency examiners and consider whether a competency examination may be a "dual purpose" examination.

The content of the competency examination and report will also be considered. In this area the task force will undertake an extensive review of "present tests" and the reporting requirements under those tests. The goal of the task force will be to construct a specific guideline setting forth areas which must be addressed in a competency examination by the examining experts. Part and parcel of this inquiry will be a specific delineation of necessary treatment indicated by the examination. In accordance with *Jackson v. Indiana*,[36] the examining expert must render a prognosis concerning whether the defendant will improve within a reasonable time. In addition, the task force will also consider the relationship between an incompetency commitment for treatment and civil commitment.

Task Force Two will also examine specific fifth and sixth amendment rights as they relate to court-ordered competency examinations. For example, to what extent does the right to counsel extend to the diagnostic examination and may counsel be an active participant rather than an observer? In addition, issues of confidentiality will be reviewed and the task force will examine such concomitant issues as psychiatric *"Miranda"* warnings and the applicability of exclusionary rules related to information obtained during a competency examination.

While exploring procedural and due process questions, the task force will also attempt to draft guidelines for the actual hearing on the issue of competency. Included in this area will be such issues as the necessity for a formal hearing, the nature of evidence to be considered at such a hearing, burden of proof requirements, treatment issues, and the actual content of a judicial order adjudicating a defendant incompetent.

Post-incompetency commitment treatment will also be considered. The task force will explore a defendant's right to appropriate treatment as well as

36. 406 U.S. 715 (1972). This case involved a deaf mute, Theon Jackson, who was charged with robbery in the criminal court of Marion County, Indiana. He possessed virtually no communications skills. As a result, the court held a competency hearing. At the hearing, two doctors stated that Jackson would probably never learn to read or write. Subsequently, the trial court ordered Jackson committed to a mental hospital until the hospital could certify that Jackson was sane. Jackson's attorney argued that committing Jackson to a mental hospital under the circumstances was equivalent to a "life sentence" without the benefit of a trial. The attorney also argued that this commitment violated Jackson's fourteenth amendment rights to due process and equal protection.

The Supreme Court reversed the trial court decision and held that Jackson could not constitutionally be committed for an indefinite period of time because he was incompetent to stand trial. Such a person can only be held until the state is able to determine whether it is probable that the incompetent will attain competency in the future. If the person will not attain competency, civil proceedings which involve an indefinite commitment must be applied.

a defendant's right to refuse treatment. Issues to be explored include an examination of least restrictive alternative matters and the site of hospitalization.

Finally, Task Force Two will examine issues regarding the duration of commitment and the perplexing issues surrounding permanently incompetent defendants.

Task Force Three

Task Force Three has been assigned the topic of nonresponsibility for crime or, in other words, the insanity defense. Perhaps no issue in contemporary criminal law has received as much recent public attention as the topic of the insanity defense. Nonetheless, the major substantive issue confronting Task Force Three lies at the heart of our notions about criminal law: blameworthiness. It is this fundamental question, the nature of legal guilt and legal responsibility, which will be examined by Task Force Three. The Task Force will concentrate on a variety of procedural issues connected with the use of the insanity defense, such as notice requirements and sanctions for the failure to comply with such requirements, and diagnostic examinations sought by the defense and ordered by the court. In addition, the task force will concentrate on discovery and privilege questions which arise from the mental examination and, at the actual trial stage, attention will also be given to issues involving the introduction of evidence of mental disorder and questions regarding the burden of going forward and the burden of persuasion. Finally, the task force will deliberate regarding jury instructions and forms of the verdict.

Task Force Four

This task force will concentrate on special dispositional statutes and mentally disabled convicts. The task force will undertake an examination of the utility of special dispositional statutes presently in force throughout the country, that is, sexual psychopath statutes. In addition, the task force will examine the kinds of mental health treatment available to incarcerated offenders.

First, Task Force Four will examine the application of special dispositional statutes to persons subject to commitment thereunder because of the type of crime they committed or because of their mental condition at time of sentencing.

Second, the task force will develop guidelines for:

a.) the commitment of special defendants to mental health facilities for diagnosis, observation, and evaluation;

b.) the procedures which must be followed before an offender may be committed under a special dispositional statute;

c.) the placement of offenders who have been found to fall within the criteria of a special dispositional statute; and,

d.) terminating offender's status under a special dispositional statute.

In addition, guidelines delineating the rights of persons committed under special dispositional statutes and guidelines defining the levels and extent of judicial oversight for such individuals will be developed.

The task force will also consider a number of specific areas regarding mentally disabled convicts. Those areas included development of criteria and procedures for the transfer of mentally disabled offenders from correctional institutions to mental health facilities and back to a correctional setting. Guidelines regarding the status and rights of prisoners who have been transferred to mental health facilities and the effect of such a transfer on eligibility for parole or other release will also be developed. Task Force Four will also create guidelines regarding the appropriate administration of mental health facilities providing treatment for inmates. Finally, the development of standards governing the civil commitment of prisoners at the expiration of their sentence will be considered.

Task Force Five

This task force will devote its attention to the civil commitment of prosecuted persons. The work of this task force will focus on such issues as examination of interim custody and the disposition of a criminal defendant immediately after that defendant's acquittal by reason of insanity. For example, the task force will consider the duration of interim custody prior to the time that a commitment hearing must be held. In addition, this inquiry will attempt to determine whether habeas corpus rights apply and whether *Miranda* rights apply.

Also, Task Force Five will concentrate on the development of standards for commitment of defendants found not guilty by reason of insanity. The task force will examine what presumptions arise from a successful insanity defense, what substantive criteria should be established for commitment, which party bears the burden of proof in the commitment proceeding, and what that standard of proof should be.

Guidelines governing commitment hearing procedures will also be established. The issues will include requisite notice to the defendant, the extent to which a right to counsel applies, the extent to which a defendant is entitled to expert witnesses, and the extent to which hearsay and other evidentiary rules and the privilege against self-incrimination apply.

Guidelines will also be developed regarding the duration of confinement of defendants committed following a not-guilty-by-reason-of-insanity verdict. The task force will consider the relationship between the period of commitment and the potential sentence for the crime with which the defendant was charged. Moreover, the task force will consider requirements for the periodic review of the patient's commitment and whether the patient may initiate that review. Procedures for the conditional release of committed persons, requirements for notification about that release, and the disposition of committed persons who have completed treatment but whose release is opposed by the courts will also be examined.

Task Force Five will create guidelines governing civilly committed per-

sons who have pending criminal prosecutions awaiting the outcome of their mental health treatment. The task force will attempt to determine whether such patients should be treated under ordinary civil commitment proceedings. In addition, issues regarding notice of release, power to release, and procedures for dropping criminal prosecution upon successful completion of treatment will be examined.

Finally, guidelines should be developed concerning defendants found incompetent to stand trial who cannot be restored to competency within a reasonable period of time.[37] The task force will examine whether there are persuasive and constitutionally permissible reasons for treating such defendants differently from those who face civil commitment.

Task Force Six

This task force is charged with the responsibility for examining the ethical guidelines governing the role in the criminal process of psychiatrists, psychologists, and community mental health staff members. The task force will therefore explore the fundamental relationships between mental health professionals and their individual and institutional counterparts within the criminal justice system. This is an especially sensitive and challenging topic. The task force will attempt to delineate specifically the roles which mental health professionals should play at the pretrial, trial, and post-trial stages of the criminal process.

Traditionally, mental health professionals called as experts in criminal law matters have been psychiatrists. Nonetheless, this task force will attempt to promulgate guidelines which would provide for the participation of psychologists and other non-psychiatrists as experts.

Moreover, the task force will devote considerable attention to matters involving interdisciplinary communication within the criminal justice system. The purpose of this inquiry is to develop guidelines to assist mental health professionals in the acquisition of a full understanding of their role as experts and consultants within the criminal justice system. Concomitantly, an attempt will be made to promulgate guidelines which will assist attorneys and other officers of criminal justice institutions in their interactions with, and understanding of, the role and function of mental health professionals. Thus, the task force will focus attention on the need for standards of professional responsibility and performance, interdisciplinary training and cooperative problem-solving, and a delineation of the responsibilities of mental health institutions.

Because of the nature of this undertaking it is imperative that the task forces be interdisciplinary in character. That goal has already been achieved and forty-two task force members have been appointed. Eight psychiatrists, five psychologists and one medical doctor currently serve on the project. In addition, each task force is served by at least one member of the ABA's Commission on the Mentally Disabled. Finally, many of the lawyer members of the respective task forces have substantial background and experience in

37. *See id.*

mental health law issues. This heavy emphasis on the involvement of mental health professionals recognizes the fact that the eventual promulgation of standards within this area requires the full participation of psychiatrists and psychologists. The need for interdisciplinary involvement with the *Criminal Justice Standards*' development was made more than evident when the Standing Committee undertook the task of proposing legal status of prisoners standards to the ABA's House of Delegates in 1979. Substantial opposition to those standards was generated by the corrections profession, and the failure to involve that profession during the initial stages of the standards development work resulted in substantial delays. To remedy that kind of oversight, the Standing Committee has provided for the participation of mental health professionals in its current project at the outset. That participation is more than cosmetic and the project's Joint Advisory Committee, in addition to its three members from the Standing Committee, has three representatives who have substantial mental health backgrounds. One, Dr. Bernard Diamond, is a distinguished forensic psychiatrist; another, John McNeill Smith, is a lawyer who serves as chairman of the ABA's Commission on the Mentally Disabled; and the third, Professor Norval Morris, is a distinguished law professor and former law dean whose wide-ranging dissertations on the criminal law include a keen interest in the relationships between law and psychiatry.

By April 30, 1982 the Standing Committee on Association Standards for Criminal Justice will complete Phase I of this project. The work product will consist of provisional black letter standards and supporting legal memoranda. Those professional standards will represent the initial interdisciplinary decisions of the project's six task forces. While these professional standards will not represent the views of the American Bar Association, they will provide the basis for a more concentrated Phase II activity which, by August 1984, will produce final and voluminous recommendations for formal consideration by the ABA's House of Delegates. The Phase II Criminal Justice Mental Health Standards Project, should it succeed in obtaining funding, will rely heavily upon the participation of mental health professional organizations as well as upon the continued participation of individual psychiatrists, psychologists, and other mental health professionals.

CONCLUSION

The Standing Committee believes that the second edition of the ABA *Standards for Criminal Justice* is a worthy successor to the original *Standards*. The second edition preserves and enhances the high quality of the first edition and represents a just balance between the dynamic and sometimes conflicting goals of effective administration of criminal justice: a proper regard for the constitutional rights of the accused and the protection of society. The format of the second edition will permit periodic revision to ensure its continued viability, and the second edition should enjoy the same wide acceptance as its predecessor. It should continue to bring great credit to the ABA for its enlightened leadership in pioneering the development of *Criminal Justice Standards* when the need was so great, and for the unwavering support of

its handiwork ever since. This brief description of the evolution of the ABA *Standards* will hopefully demonstrate for the reader the extent to which the *Standards* represent an association-wide undertaking which has distilled the learning and experience of the legal profession and which demonstrates clearly our profession's dedication to fair and effective administration of the law in the service of the public.

A COMPARISON OF THE FIRST AND SECOND EDITIONS OF THE ABA STANDARDS FOR CRIMINAL JUSTICE

H. LYNN EDWARDS*

INTRODUCTION

In today's milieu of commercial hucksters' overkill of the label "New and Improved," there is an understandable hesitancy to undertake a comparison of a first and second edition of a product, notwithstanding the fact that the second edition may reflect many legitimate changes both new and definitely improved. The average consumer has become callous and his skepticism heightened by too many commercial products hardly born before being replaced in kind by a successor, usually distinguishable only by a dressed-up package prominently bearing the label "New and Improved." Sadly enough, in too many instances the consumer is left confused and disillusioned as to precisely what makes these "new and improved" versions meaningfully different from what they replace.

The American Bar Association's *Standards for Criminal Justice*[1] (*Standards*) are not in commercial competition with anyone or anything. Rather, as more fully explained in one of the companion articles in this symposium, the *Standards* exemplify a public service motivated by a mammoth commitment of time, money, and personnel to pioneer, publish, implement, and keep up to date a complete set of standards relating to the entire spectrum of the administration of criminal justice.

The second edition truly represents many major improvements over the first. For one thing, it has a greatly revised format, comprising both utilitarian and stylistic revisions. The *Standards* were intended as valuable tools to assist in comprehending and participating in the improvement of criminal justice, and the changes will make the *Standards* more comprehensible and useful to laymen and professionals alike. These nonsubstantive changes are

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The author thanks the staff of the Standing Committee on Association Standards for Criminal Justice for their assistance and acknowledges his reliance on the Commentary to the STANDARDS FOR CRIMINAL JUSTICE. He also expresses his appreciation to the American Bar Association and to Little, Brown and Company for their copyright permission.

1. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980).

fully explained in the introduction to the four-volume set, and are summarized in this symposium's initial article, which chronicles the history and evolution of the project.

Also, the second edition contains many substantive changes. These evolved from a thorough evaluation of the entire bold-face text of the first edition as well as its rich and extensive supporting commentary. More than a decade had passed since many of the first edition's volumes had been finally approved and published. Given the dynamic nature of criminal justice in the decades of the 1960's and 1970's, it is little wonder that the task forces were confronted with a multitude of appellate court opinions and new philosophical insights. Add to these the practical experience garnered from almost ten years of nationwide implementation coordinated by the ABA's Criminal Justice Section, supplemented by feedback from many experimental and research projects initiated or stimulated in whole or in part by the influence of the *Standards*. Finally, the second edition represents a significant degree of confirmation and fine-tuning of an impressive number of concepts that were innovative or tentative in the original product, yet withstood the rigid stresses of time and testing, and merited restatement with only the commentary updated.

The major substantive changes will be the focus of this article. This task will be massive, requiring a broad-brush treatment in many areas. In certain categories, where particularly complex issues or unsettled problems are undergoing intensive national debate or litigation, the substantive standards relevant to such will be covered in depth in companion articles in this symposium issue. I trust the overall result will reaffirm the established classic stature of the ABA *Standards for Criminal Justice*, thus vindicating the confidence of the first edition's host of adherents and winning new converts to the second edition.

I. CHAPTER 1—THE URBAN POLICE FUNCTION

This set of standards—the last of the original eighteen sets to be approved (1973)—constitutes the first chapter in the revised format. The rationale for the change in sequence of the chapters is that the chapters should be arranged in the order in which a case would proceed through the criminal justice system—from the initial involvement of the police through final post-conviction remedies.

Despite the increasingly critical role of the police and escalating national concern about crime, few major substantive changes were warranted in this chapter. As will be seen, even those additions built upon foundations solidly laid in the original work.

Standard 1-3.5, entitled "Developing Alternative Responses," reads as follows:

> The development of alternatives to investigation, arrest, and prosecution should be the responsibility of the entire community and not of the police alone. However, the police should inform the community of the need for such alternatives within their area of responsibility. The choice among alternative responses should be

based on a careful assessment of effectiveness in dealing with social problems.

The entire standard is new. Examples of situations where police involvement may not be the best way to respond include problems with the chronic alcoholic, the mentally disturbed, or parties to domestic disputes; yet these are among the high-volume social problems which have been traditionally relegated to the police to handle under their general authority to respond to complaints and make arrests. More often than not, the police have become dumping grounds for such social problems simply because more enlightened and effective alternative solutions have not been sought.

It has become clear that police alone cannot successfully handle all social problems. To illustrate, well intentioned experiments for police referral of alcoholics to detoxification centers as an alternative to the all too familiar turnstile justice have failed because some treatment centers have imposed on the police highly selective requirements that have limited referrals to a small fraction of the total volume, simply because the treatment centers wanted only the best prospects for rehabilitation. Other failures have resulted because detoxification centers were located too far from the police stations that were to utilize them. In still another example, involving battered wives, New York City initiated a Family Crisis Intervention Project, but it led to a lawsuit by wives against the police department, alleging that police were failing to respond to their requests for protection from assaultive husbands—that instead of making arrests, police were referring complaints to agencies in accordance with the project which was predicated upon noncriminal handling.

Although this single new standard is but a fraction of the entire chapter, its implementation holds enormous promise of economies and relief for overworked, undermanned police; raises expectations of improved allocation of scarce resources of state and local governments facing impossible budget problems; and points the way for cooperative planning and meaningful involvement of community leaders and human resource agencies in devising more permanent solutions to high-volume social problems that are not really criminal.

Standard 1-5.3, entitled "Sanctions," has been amended substantially, in that paragraph (b) has been amended to read as follows:

> (b) Legislatures should clarify the authority of police agencies to develop substantive and procedural rules controlling police authority—particularly regarding investigatory methods, the use of force, and enforcement policies—and creating methods for discovering and dealing with abuses of that authority. *Where adequate administrative sanctions are in effect, evidence obtained in violation of administrative rules should not be excluded in criminal proceedings.*

The italicized portion is new, and represents an effort in the second edition to provide a practical alternative to the exclusionary rule except in instances where the court's examination of the circumstances cannot overcome the unconstitutional taint on the evidence.

As the commentary to standard 1-5.3 reflects, the Supreme Court in

recent years has refused to expand the exclusionary rule; to the contrary, a number of decisions have restricted its applicability, while retaining the basic doctrine. At the same time, the Court has permitted the clear inference that it would consider meaningful alternatives. Thus, the American Bar Association (ABA) urged that the search for alternatives be given a high priority.[2]

Both the first and second editions of the Urban Police Function Standards recognize that the hope of successfully controlling the evil that generated the exclusionary rule lies in guiding and governing the exercise of police discretion. Despite the undisputed logic and basic soundness of the thesis presented by the *Standards*, progress in the form of visible action by courts, legislatures, and even police departments has been lamentably slow. Judges tend to focus in suppression issues only on the actions of the officers rather than the policy—or lack thereof—of the department relating to the action; yet there is precedent where the court did go behind the action and concluded that the police department had established guidelines for the officers which the court accepted as "a careful and commendable administrative effort . . . ."[3] In another case, the refusal of the Court to examine the constitutionality of New York's stop-and-frisk statute, and to confine itself solely to the officer's actions, may have discouraged legislative efforts to enact standards for police investigative methods.[4]

Legislatures need to persist in taking proper initiatives to encourage police in the rule-making process. Where there might be police hesitancy because of uncertainty as to whether police have the authority, legislation should be passed to clarify the issue, setting benchmarks as needed, and providing for periodic review.

In the final analysis, police administrators must overcome a traditional reluctance to formulate and articulate administrative policies covering the exercise of police discretion as officers confront the myriad problems in investigations, interrogations, arrests, searches and seizures, and identifications. An essential part of these policies is a fair set of procedures for ensuring accountability of police officers to the department and the public for their actions. The *Standards* also outline the need for positive approaches to complement sanctions as aids and inducements to control police practices.

Approval by the American Law Institute of the Model Code of Pre-Arraignment Procedure[5] is an encouraging example of an attempt to find an alternative to the exclusionary rule. The Model Code, in simplistic terms, proposes that a motion to suppress be granted only if the violation was "substantial," or if exclusion is otherwise constitutionally required. As to whether a violation is substantial, the Model Code provides as one of the criteria: *"whether there is a generally effective system of administrative or other sanctions which makes it less important that exclusion be used to deter such violations."*[6]

2. ABA REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE (1976).

3. United States v. Perry, 449 F.2d 1026, 1037 (D.C. Cir. 1971) (pertaining to pretrial identification procedures).

4. Sibron v. New York, 392 U.S. 40 (1968).

5. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975).

6. *Id.* § 150.3(3)(e) (emphasis added).

Although the ABA has not taken an official position on the Model Code, the Code's recognition of the concept of administrative regulations and sanctions in relation to the exclusionary rule should provide additional incentives to courts, legislatures, and the police to implement the concept recommended in the *Standards*.

II. CHAPTER 2—ELECTRONIC SURVEILLANCE

The first edition of these standards was approved in 1971. They were formulated contemporaneously with congressional consideration of legislation which was enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[7] commonly referred to as the federal wiretap act. The first edition closely parallels Title III, but, like all of the standards, is also intended to provide suggested guidelines for state and local jurisdictions as well as the federal government.

These standards and Title III have both withstood constitutional and other challenges in the intervening years. With some exceptions, the second edition is substantially a restatement of the first, but much stronger because of confirming and interpretative case law, plus an extensive evaluation of Title III by the National Wiretapping Commission.[8]

The pervading theme of the second edition continues to be two-fold: assisting law enforcement and protecting privacy. Considering the fact that the Electronic Surveillance Standards and Title III both represented a frontier-clearing effort in a veritable thicket of uncharted legal terrain, the findings of the Commission were a gratifying credit to the structure and functioning of both.

In formulating the second edition, the decision was made not to include new standards covering the use of pen registers and similar devices which record numbers dialed from a monitored phone without intercepting conversations. Rather, the standards were limited to conversations.

One amendment in the second edition was to change the title of Part III of the *Standards* from "National Security" to "Surveillance Related to Foreign Intelligence Activities." This was done to identify more accurately the precise scope of the standard and reflect the distinction made in *United States v. United States District Court*[9] (commonly known as the *Keith* case). In *Keith*, the Supreme Court held that the warrant requirements of the fourth amendment applied to electronic surveillance conducted against domestic organizations that have no direct or indirect involvement with a foreign power. In the interim between the approval of the first and second editions, the Foreign Intelligence Security Act of 1978 was enacted, establishing procedures similar to Title III for judicially supervised electronic surveillance involving foreign security.[10]

Standard 2-5.2, dealing with emergency surveillance, was amended to

7. 18 U.S.C. §§ 2510-2520 (1976).
8. NATIONAL WIRETAPPING COMMISSION REPORT (1976).
9. 407 U.S. 297 (1972).
10. 50 U.S.C. §§ 1801-1811 (1976).

limit its use to situations "involving substantial and imminent danger to human life"; thus there was deleted an implicit authorization for emergency installations in covering meetings characteristic of organized crime as being too vague and susceptible of abuse by law enforcement officers who should normally have time to obtain a court order.

Standard 2-5.3 covers the application for an electronic surveillance order. One change in the second edition is to require "a full and complete statement of other investigative procedures that have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."[11] Another is to require "a statement of the need for telephone or telegraph companies, landlords, custodians, or other persons to furnish information, facilities, or technical assistance, if such is necessary in the execution of the order."[12] The first was designed to conform to the basic requirement of probable cause (Standard 2-5.4). The second tracked a 1970 amendment to Title III[13] resulting from the opinion in *In re Application of United States*[14] holding that telephone company cooperation could not be compelled by judicial order absent statutory authority.

Another substantive change in the second edition was made in standard 2-5.9 pertaining to extensions. The provision in the first edition authorizing extensions of initial surveillance orders for not longer than thirty days was changed to fifteen days; inasmuch as the *Standards* place a fifteen-day limit on initial orders,[15] logic would argue against granting more time for an extension.

Standard 2-5.10, relating to privileged communications, contains a change of substance from the first edition to expand the scope of the standard to include all professionals whose conversations are deemed privileged under applicable state law. Thus it serves as a guideline to correspond with the expansion of the concept and protections of privileged communications.

III. CHAPTER 3—THE PROSECUTION FUNCTION

When the first edition of the Prosecution Function Standards was adopted by the Association in 1971, it represented the first national effort to compile uniform guidelines for the professional conduct of prosecuting attorneys. The standards contained in the first edition did no more than codify standards of conduct which were already adhered to by the best advocates, both prosecution and defense, throughout the country.

Although promulgating and enforcing professional standards are clearly matters that must be handled by the individual jurisdiction, a national organization such as the ABA is in an ideal position to establish recommended standards of conduct to guide the individual jurisdictions as well as individual practitioners. The standards relating to the prosecution and defense

11. STANDARDS, *supra* note 1, § 2-5.3(i).
12. *Id.* § 2-5.3(k).
13. 18 U.S.C. § 2518(4) (1976).
14. 427 F.2d 639 (9th Cir. 1970).
15. STANDARDS, *supra* note 1, § 2-5.8.

functions, along with the ABA Code of Professional Responsibility,[16] are just such guidelines. In the decade of their existence the prosecution function standards have become the basic ethical guidelines relied on by many prosecutors.

In preparing the second edition of these standards the ABA reviewed court decisions and recommendations of other organizations and concluded that the standards required no fundamental alteration. There are, of course, changes in the second edition reflecting both evolving concepts of what is appropriate behavior and significant court decisions affecting this area.

The first of the revised standards (3-1.1), which contains only stylistic changes from the first edition, outlines the function of the prosecutor and his or her role as "both an administrator of justice and an advocate." The standard states that "the duty of the prosecutor is to seek justice, not merely to convict." These phrases highlight the important role of the prosecutor as an officer of the court charged with protecting the rights of the accused as well as enforcing the rights of the public.[17]

Standard 3-1.3, dealing with public statements, contains a new paragraph, 3-1.3(c), which provides that the prosecutor and the police should cooperate in complying with the chapter on Fair Trial and Free Press in order to assure a fair trial for the accused.

Standard 3-2.5 reflects a change in policy recommended by the ABA to permit public access to the "office handbook," except to confidential portions. The handbook is a statement of policies and procedures which should be kept within each prosecutor's office to promote continuity and clarity of functioning. Such a handbook would include current rules, statutes, and judicial decisions, along with detailed descriptions of the criteria governing the principal duties of the office and standards pertaining to the exercise of discretion. Standard 3-3.2 deals with the prosecutor's relations with prospective witnesses. Like its predecessor, it proscribes compensation of witnesses (other than experts) for giving testimony, but authorizes reimbursement of a witness for reasonable expenses, including transportation and loss of income. Unlike the first edition, this section authorizes reimbursement not only for court appearance but also for "attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews."[18] A more important change in this section replaces the first edition statement that "it is proper but not mandatory" for a prosecutor to caution a witness concerning possible self-incrimination (whenever there is reason to believe the witness may be the subject of a criminal prosecution) with the stricture that a prosecutor "should" so advise a witness.[19] This situation does not constitute "custodial interrogation," which would trigger the constitutional requirement of such a warning,[20] but the Association has con-

16. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969).

17. *See id.*, EC 7-13.

18. The same change has been made in the standards on the Defense Function 4-4.3(a).

19. *Cf.* § 4-4.3(b) ("It is not necessary for the lawyer or the lawyer's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.").

20. Miranda v. Arizona, 384 U.S. 436 (1966).

cluded that fairness to the witness requires more than the minimum actually imposed by law.

A new section has been added to standard 3-3.4, which states that "[a]bsent exceptional circumstances, no arrest warrant or search warrant should issue without the approval of the prosecutor." In approving similar provisions in the National Prosecution Standards,[21] the National District Attorneys Association noted that "[t]he role of the prosecutor is most apparent in determining whether probable cause exists in preparation of search and arrest warrants. Review of all applications for warrants prior to their submission for judicial approval could enhance the efficiency of the criminal justice process."[22] "Exceptional circumstances" might exist, for example, if a prosecutor were unavailable at a time when a warrant had to issue immediately.

A change in standard 3-3.6(b) would amend the duty of the prosecutor to present exculpatory, as well as incriminating, evidence to a grand jury. The first edition required the prosecutor to "disclose to the grand jury any evidence which he knows will tend to negate guilt." Under the revision, "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." This change was made to conform this section to the grand jury standards which were approved by the ABA House of Delegates in 1977.[23]

Standard 3-3.11(a), like standard 3-3.6, deals with required disclosure of exculpatory evidence, but in the context of disclosure to the defense rather than the grand jury. This paragraph classifies as "unprofessional conduct" the intentional failure of a prosecutor to disclose to the defense the existence of evidence which would tend to negate the guilt or reduce the punishment of the accused.[24] The word "intentional" was added in the second edition. The definition of what constitutes exculpatory material is adopted from the decision of the Supreme Court in *Brady v. Maryland*.[25] The standard adopts the suggestion of the Supreme Court that "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[26]

Part IV of these standards concerns the role of the prosecutor in plea discussions. Standard 3-4.1 remains largely unchanged from the first edition, though paragraph (b) has been amended to include a recommendation that a prosecutor make and preserve a verbatim record of plea discussions with a defendant who has waived counsel. The first edition simply stated that a prosecutor would be "well advised" to make sure that another attorney was present at such discussion. The requirement of a verbatim record is a more efficient means of protecting the rights of the defendant and protect-

21. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 7.3(a)-.3(b).

22. *Id.* § 7.3, commentary at 116.

23. *See* Report with Recommendations to American Bar Association, 1977 Annual Meeting, Report 115. The standards relating to the charging process (including grand jury), when drafted and approved, will become Chapter 9 of the ABA STANDARDS FOR CRIMINAL JUSTICE.

24. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) contains a similar provision but extends it to evidence that tends to "mitigate the degree of the offense."

25. 373 U.S. 83 (1963).

26. United States v. Agurs, 427 U.S. 97, 108 (1976).

ing the prosecutor from charges of exerting undue influence in a situation which obviously involves very unequal bargaining positions.[27]

The first edition standard 4.2 has been deleted following the Supreme Court decision in *North Carolina v. Alford*.[28] The deleted standard provided that a prosecutor could not participate in a disposition by guilty plea if the prosecutor was aware that the accused persisted in denying guilt or the factual basis for the plea. The Court in *Alford* held that a guilty plea can be accepted by a court even when the defendant denies guilt so long as the plea is voluntarily and intelligently made.

Revised standard 3-4.2 (which appeared as 4.3 in the first edition) contains two substantive changes. Paragraph (b) now states that it is "unprofessional conduct" for a prosecutor to imply greater power to influence the disposition of a case than he or she actually possesses. The first edition states only that a prosecutor "should avoid" such implication.

The other change in this section was mandated by the Supreme Court's decision in *Santobello v. New York*.[29] Paragraph (c) in the first edition permitted breach of a plea agreement by a prosecutor "unable to fulfill an understanding previously agreed upon," provided prompt notice was given to the defendant. In *Santobello* the Supreme Court held that when the prosecutor had breached an agreement to make no recommendation respecting sentence, the defendant was entitled either to withdraw the plea or to be resentenced. Failure to honor such an agreement casts doubt on the voluntariness of the guilty plea and may result in fundamental unfairness to the defendant. Such a breach would, under the second edition, subject the prosecutor to discipline by a professional association. Failure to comply with the agreement would be permitted, however, if the defendant fails to comply or if "other extenuating circumstances are present" (for example, discovery of new facts by the prosecutor).

Standard 3-5.7, on the examination of witnesses, has been amended by changing the basis a prosecutor must have for belief in the factual predicate implied in questions asked of a witness. Paragraph (d) of the first edition states: "It is unprofessional conduct to ask a question which implies the existence of a factual predicate *which the examiner knows he cannot support by evidence*." The revision would replace the italicized portion of paragraph (d) with "for which a good faith belief is lacking," a less stringent standard.

The last substantial change in this chapter is contained in Part VI on sentencing and concerns the role of the prosecutor at sentencing. The revised standard 3-6.1 presents the modern view that a prosecutor should, and in some cases must, offer a sentencing recommendation to the court. The previous standard stated that the prosecutor "ordinarily should not" make such a recommendation unless asked by the court or obligated by a plea agreement to do so.

27. Standard 14-3.1(a) contains the identical suggestion.

28. 400 U.S. 25 (1970).

29. 404 U.S. 257 (1971).

IV. CHAPTER 4—THE DEFENSE FUNCTION

The roles played by defense counsel exemplify some of the major difficulties inherent in our adversary system of justice. As a "servant of two masters" the defense attorney must often tread a narrow path between jeopardizing the interests of the defendant and failing to fulfill professional obligations as an officer of the court. The ambiguity is summed up in Canon 7 of the ABA Code of Professional Responsibility: "A lawyer should represent a client zealously within the bounds of the law."

An interesting example of the most extreme form the conflict can take appears in standard 4-7.7, concerning testimony by the defendant. The standards currently contain no final policy on this matter, as the ABA House of Delegates was unable to reach a consensus on what position to take with respect to the duties of a defense attorney whose client wishes to present perjured testimony. A full, scholarly, and insightful analysis of the professional dilemma posed by the perjurious client is set forth by Justice William Erickson in another section of this symposium.

Most criminal cases—as many as ninety-five percent in some jurisdictions—do not go to trial, so a large part of defense counsel's professional attention should go toward ameliorating the condition of the accused outside the courtroom. Before trial, for example, defense counsel can play a significant part in helping an accused maintain employment and other stabilizing relationships; in plea discussions which result in disposition without a trial the role of defense counsel can be critical.

Standard 4-1.1, which contains a general outline of the role of defense counsel, remains essentially unchanged from the first edition. The basic thrust of the section is to emphasize the obligations of defense attorneys to maintain the ethical standards required by the profession and not to compromise those standards even in the service of a client.

Standard 4-3.5 presents guidelines on handling potential conflicts of interest with which defense attorneys may be faced. Paragraph (b) deals with the problem of representing more than one defendant. Ordinarily a lawyer (or lawyers associated in practice) should not represent more than one defendant in a criminal case. In "unusual situations" such multiple representation may be permissible, but only after careful investigation has revealed: 1) that no conflict is likely; 2) that all defendants have given *informed* consent; and 3) that their consent is made a matter of judicial record. This last requirement was added in the second edition following the Supreme Court decision in *Holloway v. Arkansas*.[30] There the Court held that although joint representation is not prohibited, whenever impermissible joint representation occurs reversal is automatic and no particularized showing of prejudice is required. This avoids having to make difficult judgments on the actual impact of conflicts of interest on the representation of a client. The ABA standard has dealt with this problem by involving the trial judge in the initial determination of the permissibility of multiple representation. After requiring that consent be made a matter of judicial record, the standard goes

30. 435 U.S. 475 (1978).

on to spell out the duties of the trial judge in establishing that consent of the defendant is truly informed, that is, that the defendant understands the potential for conflict. In some cases, the standard continues, accepting or continuing employment by more than one defendant is "unprofessional conduct."

Standard 4-4.3 concerns relations of defense counsel with prospective witnesses. Like the corresponding section in the *Standards* relating to the prosecution function, paragraph (a) now authorizes reimbursement of expenses to witnesses for specified appearances other than in court. A more significant change in this standard appears in paragraph (b), which concerns the obligation of a defense lawyer to caution a prospective witness concerning possible self-incrimination and concerning the need for prospective witness counsel. Original paragraph (b) stated that it was "proper but not mandatory" for defense counsel to give such advice; the revised standard states that "[i]t is not necessary" to do so. The ABA has concluded that the giving of such a warning is inconsistent with the duties of a lawyer to a client as it may have the result of discouraging the witness from speaking with the defense attorney. The obligation of a prosecutor in this situation is distinctly different from that of defense counsel;[31] unlike defense counsel, a prosecutor cannot conceal information concerning law violations and must therefore take more care to protect the rights of the witness as potential defendant.

While the decision to plead is ultimately for the accused, the so-called *Alford* plea has altered defense counsel's obligations under the *Standards*. Standard 5.3 from the first edition has been deleted. That first edition standard required a defense attorney to notify the court in the event that a defendant insisted on pleading guilty despite the existence of facts which negated guilt. After the first edition was approved, however, the Supreme Court decided *North Carolina v. Alford*,[32] which made it clear that a trial court may accept a guilty plea even though a defendant claims innocence. Failure of defense counsel to reveal the defendant's private claim of innocence should not produce a different result. Furthermore, such a revelation will undoubtedly damage the attorney's relationship with his or her client. As a matter of practice, it is believed that adherence to original standard 5.3 by defense counsel was virtually nonexistent.

Standard 4-6.1 deals with the important area of defense counsel's duty to explore disposition without trial. Paragraph (b) has been amended and no longer requires the conclusion by counsel that "conviction is probable" before plea discussions are begun. There may be advantages to the defendant from disposition of a case without trial, and the initiation of discussions early in the proceedings may result in swift disposition, which is beneficial to all parties. This paragraph continues the requirement, contained in paragraph (c) of the first edition, that "ordinarily" the consent of the defendant should be obtained before plea discussions are engaged in, since the decision

31. *See* discussion of companion standard 3-3.2 relating to the Prosecution Function p. 31 *supra*.

32. 400 U.S. 25 (1970).

of whether to accept a plea is ultimately one to be made by the defendant.[33] Another addition to this section is the statement that "[u]nder no circumstances should a lawyer recommend . . . acceptance of a plea unless a full investigation and study of the case has been completed."

Standard 4-7.3, relations with jury, contains a number of modifications. Among these is a change in the required grounds for communicating with a jury following the verdict. Under the revision, "[i]f the lawyer believes that the verdict may be subject to legal challenge" then the lawyer may properly communicate with jurors (assuming no statute or rule to the contrary). Under the first edition the lawyer had to have "reasonable grounds to believe" such challenge available. Further, under the revision, notice to opposing counsel and the court is not required.

Standard 4-7.6, examination of witnesses, has two changes—one a change in emphasis and the other a change to conform the standard to accepted usage. Paragraph (b) concerns cross-examination of truthful witnesses. In the first edition that paragraph cautioned against "misuse" of the power to discredit or undermine a witness. The second edition, recognizing that use of such cross-examination may be an important part of a good defense, recommends that the truthfulness of the witness "be taken into consideration." Paragraph (d) of the revised standard requires "good faith belief" in the factual predicate implied by questions asked of a witness.[34]

This discussion highlights the major changes contained in the second edition. Users of the *Standards* should know, however, that standard 4-7.7 as it appears in the second edition remains only a provisional standard and has not been adopted by the ABA House of Delegates. This standard is the subject of Justice Erickson's article on the perjurious defendant.

V. CHAPTER 5—PROVIDING DEFENSE SERVICES

This set of standards has been among the most influential of the entire group, and most states have adopted key elements of them since their initial approval in 1968. In the period between the first edition (1968) and final approval of the second edition in February, 1979, the areas of law and procedure covered by this chapter have undergone dramatic change, resulting in significant substantive revisions in the second edition. As will be seen, however, these changes serve to reaffirm and strengthen the fundamental premises upon which the entire first edition rested. Also, they build upon the extensive growth and acceptance of organized defender programs. Finally, the changes seek to flesh out an evolving recognition of the need for defenders, as well as assigned counsel, to be absolutely independent of judicial and political interference.

In order to appreciate better the significance of the changes, the reader should bear in mind the roots of our common law system of justice, which comprise these basic assumptions: 1) that an accused person is presumed

33. *See* STANDARDS, *supra* note 1, § 4-5.2, control and direction of the case.

34. *See* discussion of companion standard 3-5.7 relating to the Prosecution Function, p. 33 *supra*.

innocent; 2) that guilt must be proven in an adversary proceeding in which the prosecutor as charging authority carries the burden; and 3) that the two adversaries may be aided by advocates capable of rendering effective assistance.[35]

Early in the system, emphasis was only on the right to retain counsel, without a guarantee that counsel would be provided to those unable to secure it. In 1932, the Supreme Court in *Powell v. Alabama*[36] first recognized the constitutional right of an accused to have counsel appointed by the court. In 1963, in the landmark case of *Gideon v. Wainwright*,[37] the Supreme Court took the giant step of holding that the fourteenth amendment fully incorporated the sixth amendment right and thus required states to provide counsel for indigent defendants in all serious (felony) cases.

Against the preceding sketchy backdrop, let us now examine the revisions in the second edition.

In the first edition, standard 5-1.1, entitled "Objective," reads that "the bar should . . . ensure the provision of competent counsel to all persons who need representation in criminal proceedings . . . ." Reference to the bar has been deleted in the second edition because the necessity of guaranteeing legal representation is shared with society as a whole. The revised standard, however, retains a provision that the bar should educate the public to the importance of this objective. Also, as revised, this standard stresses "quality" rather than merely "competent" representation, thus furthering both the spirit and the letter of the sixth amendment. The choice of the adjective "quality" contemplates providing to the accused the same caliber of legal services that a defendant of financial means could retain. The vital issue of what is adequately effective assistance of counsel has been a subject of sharpening focus since the first edition. Justice William H. Erickson of the Colorado Supreme Court reviewed the emerging case law in the light of its constitutional underpinnings, and argued that the want of a precise standard for assessing the competency of defense counsel continues to be a source of confusion within both state and federal courts.[38]

Standard 5-1.2 ("Plan for Legal Representation") has been changed substantially. The first edition stated that either a defender or assigned counsel system should be utilized in each jurisdiction. The second edition recommends that both should be available in all jurisdictions. This change gives recognition to the enormous growth and acceptance of defenders during the past decade. Another new provision in this standard states that "neither defender nor assigned counsel programs should be precluded from representing any particular type or category of case." Of course, no lawyer should undertake to provide representation in any case for which he or she lacks sufficient knowledge or experience to provide "quality" assistance. However, the thrust of the revision is to overcome prohibitions in jurisdic-

35. STANDARDS, *supra* note 1, at 5.4-.5.

36. 287 U.S. 45 (1932).

37. 372 U.S. 335 (1963).

38. Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979).

tions that automatically disqualify defenders from being counsel in specified categories of cases (for example, homicide). The revision is intended to eliminate unjustified perceptions of defenders as less capable than private practitioners, a factor which had deterred some lawyers from seeking employment in defender offices.

Several substantive changes in standard 5-1.3 ("Professional Independence of Counsel for Defense") are designed to emphasize and lend strength to this important aspect of defense services. Standard 5-1.3 is the same standard as first edition standard 1.4, but contains important revisions. First, it states that "the selection of lawyers for specific cases should normally not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender and assigned-counsel programs." This should help allay suspicion that might arise with judge-appointed counsel that those appointed may not be fully and independently committed to their clients. Second, also added to this standard is language recognizing that a board of trustees can serve as "an effective means of securing professional independence for defenders." Third, this new sentence has been added to the standard: "A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction."

Standard 5-1.5, which deals with funding for defense services, and which will be discussed below in its other ramifications, has also been phrased in the second edition to protect against the misuse of the power of the purse to undermine the vital independence of the system.

In the same way, standard 5-2.4 has been changed to reflect that compensation paid to assigned counsel "should be approved by administrators of assigned-counsel programs," another insurance against possible judicial control or influence.

Standard 5-3.1, dealing with the chief defender and staff, includes a new provision which prohibits the selection by judges of the chief defender and staff as a means of assuring independence.

The first edition of standard 5-3.2 recognized the possibility of both full-time and part-time defenders. This was changed and now reads: "Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law." The change thus recognizes a trend during the period since the first edition, as well as the inherent difficulties with part-time personnel.

Standard 5-3.3, pertaining to removal of counsel, is new in substance. By providing that "removal of counsel . . . should not occur over the objection of the attorney and the client," it seeks to promote further desirable complete independence.

Standard 5-4.1 ("Criminal Cases") has also been revised. The first edition stated that counsel should be provided for all offenses punishable by a loss of liberty "except those types of offenses for which such punishment is not likely to be imposed . . . ." Following the first edition, the Supreme Court handed down the landmark opinion in *Argersinger v. Hamlin*,[39] which

39. 407 U.S. 25 (1972).

extended the right to counsel in misdemeanor and petty offense cases. The second edition has thus been revised, and the phrase containing the exception deleted because it conflicts with *Argersinger*'s requirement that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[40]

A new provision has also been added to this standard, to make clear that the right to counsel extends to offenses which, although not themselves carrying a penalty of incarceration, may later be used as a basis for imposing imprisonment in the event of a second conviction.

Standard 5-4.3 ("Workload") is a completely new standard. It is designed to limit the caseload of defender organizations as well as that of assigned counsel to manageable levels. Historically, one of the most troublesome impediments to quality representation for the poor has been the excessive caseload of counsel. All too often in defender organizations, attorneys are asked to assume too many cases, leading to attorney frustration, disillusionment by clients, and weakening of the adversary system.

A new provision in standard 5-5.1 ("Initial Provision of Counsel") is to make clear that counsel should be provided upon request to persons in need even in situations where formal custody has not yet begun. For example, counsel should be available to persons summoned before a grand jury who believe their testimony might be incriminating. Counsel should also be available to persons required to participate in pre-arrest nontestimonial identification procedures. In this new extension, the standard admittedly goes beyond Supreme Court holdings that the right to counsel attaches at "critical stages" prior to trial. Reasons for the expansion of the right to counsel include the fact that counsel's early presence in the case may convince the prosecutor to dismiss unfounded charges or to charge the accused with a lesser offense. More importantly, earlier provision of needed counsel to those unable to afford representation would eliminate discrimination between such defendants and those of financial means.

Standard 5-5.2 ("Duration of Representation") is also a revised standard. This standard originally stated that counsel initially provided "should continue to represent the defendant through all stages of the proceedings unless a new appointment is made because geographical considerations or other factors make it necessary." Because developments have generated considerable disagreement over the wisdom of that policy, the standard has been changed in the second edition to provide that counsel continue "throughout the trial court proceedings," including the filing of post-trial motions where necessary. The standard, however, does not take a position on whether trial counsel should also provide representation on appeal, but the commentary sets out the competing arguments for guidance to jurisdictions confronted with a choice.[41]

Several significant revisions were made in Part VI ("Eligibility For

40. *Id.* at 37.

41. STANDARDS, *supra* note 1, § 5-5.2, commentary at 5.55-.56.

Assistance") in the second edition to clarify and make more meaningful and practical the provision of defense services.

Standard 5-6.1 retains the first edition basic yardstick of eligibility for counsel to persons financially unable to obtain adequate representation without substantial hardship to themselves or their families, but adds a new provision that "supporting services necessary to an adequate defense should be available . . . to all persons . . . financially unable to afford necessary support services." Several cases subsequent to the first edition have held that financial resources of spouses or relatives should not be considered in determining eligibility.[42] Although a study indicated that about seventy percent of judges surveyed considered the defendant's ability to post bond to be an important factor in determining eligibility,[43] this has been condemned by some appellate courts.[44]

Standard 5-6.2 concerns ability to pay partial costs and make reimbursement for counsel or services provided. The second edition deletes from the first edition a statement that "the provision of counsel may be made on the condition that the funds available for the purpose be contributed to the system pursuant to an established method of collection." This deletion was not intended to preclude contributions; rather, it was prompted by an assessment of experience with contribution programs which reflected that administration costs substantially exceeded minimal collections.

Finally, the second edition made a substantive change in standard 5-6.3 by deleting a provision from the first edition which provided that the eligibility determination "should be made as soon as feasible after a person is taken into custody," and it should be made by "the judge or an officer of the court selected by him." The new standard is that eligibility "should be made by defenders or assigned counsel, subject to review by a court at the request of a person found to be ineligible." The new standard should help prevent delay of entry of counsel into the case, and thus will tend to implement standard 5-5.1, which recommends that "counsel be provided as soon as feasible after custody begins."

VI. CHAPTER 6—SPECIAL FUNCTIONS OF THE TRIAL JUDGE

The first edition was approved in two segments, in July 1971 and in August 1972. The title of the first edition was "The Function of the Trial Judge"; that of the second, "Special Functions of the Trial Judge". In these two differences we find the major key to understanding most of the changes encountered in the second edition, and, although not substantive, such changes appreciably increase the value and overall utility of this chapter.

The history must be reviewed to understand these changes. In 1969, after the Advisory Committee on the Judge's Function had been drafting standards covering the entire area, the nation was beset with a series of instances involving disruptive defendants in criminal trials. The President of

42. Sapio v. State, 223 So.2d 759 (Fla. Dist. Ct. App. 1969); People v. Gustavson, 131 Ill. App. 2d 887, 269 N.E.2d 517 (1971). *See also* Annot., 51 A.L.R.3d 1108, 1114-16 (1973).

43. NATIONAL DEFENDER SURVEY, THE OTHER FACE OF JUSTICE 41 (1973).

44. *See, e.g.*, People v. Valdery, 41 Ill. App. 3d 201, 354 N.E.2d 7 (1976).

the American Bar Association requested that priority in attention be given to guidelines for handling such disruptions.[45] In July 1971, the House of Delegates approved for publication a set of "Standards Relating to the Judge's Role in Dealing with Trial Disruptions." Thereafter the committee returned to its original task, intending when finished to integrate the first segment into the total report. Thus, when the House of Delegates in August 1972 approved the remaining standards covering the trial judge's function, approval was given to integrate the earlier segment, provided only necessary editorial but no substantive changes were made.[46] This was done, and thus the first edition constituted the only set of ABA Criminal Justice Standards relating to The Function of the Trial Judge.

Another recourse to history explains the limiting change in title made in this chapter. The original *Standards* project divided the criminal justice spectrum into eighteen functional areas and assigned a manageable number of these to each of seven drafting committees. Although their work was closely coordinated by a parent committee, the most feasible procedure was for each set of *Standards* to be completed and submitted for House of Delegates approval, and thereafter publication, on a piecemeal basis. Thus, some duplication became unavoidable; yet in other instances the other standards remained somewhat general when alluding to the trial judge's role in given situations, and assumed that the user would seek recourse to the volume covering the judge's function. However, in the area of the judge's role in plea discussions and plea agreements, the piecemeal process resulted in a conflict in policy between the Pleas of Guilty and Functions of the Trial Judge standards. The reconciliation was accomplished in the second edition, as described below.

Because of the superior methodology made possible by the project governing the second edition, chapter 6 probably received the most beneficial overhaul, yet suffered least in substantive amendments. Two categories of major deletions from chapter 6 may at first glance suggest wholesale emasculation, but it is necessary to know why they were made.

The larger group of deletions corrected the overlapping and duplication that was unavoidable in the first edition. These deletions were made because the particular standard was already articulated in one of the other chapters. In some of these instances, where that particular chapter did not adequately define the judge's role, the deleted standard was transplanted to accomplish the need. In any case, these deletions served to strengthen the entire second edition.

Now a word of explanation about the other major category of deletions. The first edition had devoted four standards to areas of the judge's function relating to facilities and staff. Thus, original standard 2.1 dealt with the necessity of providing judicial manpower; standard 2.2 concerned adequacy of courtroom facilities and supporting staff; standard 2.3 articulated the trial court's obligation to seek or compel adequate support; and standard 2.4 cov-

45. ABA STANDARDS FOR CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE, Appendix at 103 (1st ed. 1972).

46. *Id.*

ered the duty to have the staff properly trained. These standards were more properly the domain of overall judicial administration, but current standards had not been formulated when the *Criminal Justice Standards* project began. In the interim, however, the Commission on Standards of Judicial Administration was created by the ABA, and in 1976 the ABA approved the Commission's Standards Relating to Trial Courts. Consequently, some of the standards that were in the first edition were deleted from the second because they were more appropriate subjects for the judicial administration standards, and equally applicable to civil as well as criminal trial courts.

Following a similar rationale, the entire topic of procedures regarding judicial misfeasance, nonfeasance, and disability has been deleted from the second edition because of the issuance in February 1978 of Standards Relating to Judicial Discipline and Disability Retirement, formulated by the ABA Joint Committee on Professional Discipline.

In view of the rather extensive pruning of the first edition and transplanting of many of its standards into other chapters, the decision was made to rename the chapter by adding the word "Special" to the title. The remaining major divisions in Chapter 6 are: Part I, Basic Duties; Part II, General Relations with Counsel and Witnesses; Part III, Maintaining the Decorum of the Courtroom; and Part IV, Use of the Contempt Power.

It now remains to be seen what substantive changes were made in the standards now comprising Chapter 6.

Standard 6-3.6 articulates guidelines for the defendant to represent himself at trial. To the original standard, which remained unchanged, the following subsection was added: "(b) When a litigant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial."

The thrust of the original standard was that the right of a defendant to proceed in the trial of a criminal case without the assistance of counsel is qualified, not absolute. Since the approval of the first edition, the right was confirmed by the United States Supreme Court in *Faretta v. California*,[47] in federal law,[48] in rule 44 of the Federal Rules of Criminal Procedure, and in many state constitutions.[49] *Faretta* also confirmed, however, that a defendant's sixth amendment right to assistance of counsel cannot be abrogated unless knowingly and intelligently waived; also, the interest of the public in an orderly, rational trial is entitled to consideration. The indicated addition of subsection (b) was designed to establish an affirmative duty on the part of the trial judge. The second edition retained, without substantive change from the first edition, standard 6-3.7 pertaining to standby counsel for a *pro se* defendant.

Standard 6-3.11 covers the matter of attorneys from other jurisdictions and the increasingly important subject in our ever more mobile society of *pro hac vice* admission of attorneys from other jurisdictions. The second edition

47. 422 U.S. 806 (1975).
48. 28 U.S.C. § 1654 (1976).
49. *See, e.g.*, PA. CONST. art. 1, § 9.

standard is unchanged, except stylistically, from the first. The standard provides that a trial judge may deny permission to appear *pro hac vice* on grounds that the attorney has engaged in misconduct, or he may grant permission on condition that the petitioning attorney associate with a local attorney as cocounsel and that the defendant consent.

On January 15, 1979, the Supreme Court handed down its opinion in the case of *Leis v. Flynt*.[50] Larry Flynt and "Hustler" magazine had been charged with dissemination of obscene materials to minors. Defendants' lawyers from out of state were denied the right to appear *pro hac vice*, whereupon suit was filed under the Civil Rights Act asserting denial of sixth and fourteenth amendment rights without a due process hearing. The federal district court enjoined the continuation of the state criminal prosecution pending the granted due process hearing. On certiorari, the Supreme Court reversed, holding per curiam that the asserted right to appear *pro hac vice* is not one of the constitutionally protected due process rights under the fourteenth amendment.[51] The Court did not address the question of the right of Flynt and "Hustler" to the assistance of counsel of their choice under the sixth amendment, although Justice White argued this be granted certiorari and set for argument.[52]

Justices Stevens, Brennan, and Marshall dissented from the majority, contending that a lawyer's interest in pursuing his profession is protected by the due process clause of the fourteenth amendment.[53]

Although the majority supports standard 6-3.11 as written, the Criminal Justice Section's governing council recommended that the ABA Standing Committee on Criminal Justice Standards give consideration to recommending to the House of Delegates an amendment to 6-3.11.[54] The thrust of the proposed amendment would be to condition denial of *pro hac vice* on a due process hearing and on a finding of courtroom misconduct that had resulted in either punishment for contempt or censure by a bar disciplinary authority, or a pending disciplinary proceeding provided that the misconduct would provide sufficient basis to disqualify an attorney licensed in the jurisdiction of the court from representing the defendant. The ABA litigation section favored an even broader policy. The House of Delegates in August 1980 declined to approve any change.

It is thus apparent that there currently is insufficient consensus to justify conclusions as to what, if any, change might finally be recommended in standard 6-3.11. Furthermore, since the Supreme Court has not yet seen fit to entertain the sixth amendment issue, any wholesale proposed revision may be premature. The matter remains under active consideration by the Standing Committee, pursuant to its mandate for continual monitoring of the standards.[55]

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50. 439 U.S. 438 (1979).
51. *Id.* at 443-44.
52. *Id.* at 445.
53. *Id.*
54. *See* Report with Recommendations to the House of Delegates, American Bar Association, 1980 Annual Meeting, Report 112A.
55. ABA CONST. AND BYLAWS § 30.7.

VII. CHAPTER 10—PRETRIAL RELEASE

The issue of bail and the companion issue of crime committed by those released on bail pending trial are problems that have received the careful scrutiny of the ABA. These are not new issues and the introduction to chapter 10 of the *Standards* acknowledges the melancholy history of bail reform:

> Unfortunately, the bail reform movement never accomplished all that was hoped for it. A decade later, our jails remain crowded with pretrial detainees, many judges continue to impose monetary conditions, compensated sureties still thrive in many jurisdictions, and pretrial crime and abscondence remain serious problems. Nor have experiments with preventive detention been notably successful.[56]

While the central thrust of the ABA's thirty-one separate standards dealing with Pretrial Release favors bail for persons accused of crime pending adjudication, the standards also recognize that some restraints on the defendant's liberty may be necessary. Standard 10-5.9 deals specifically with pretrial detention and provides a procedure for pretrial detention, which may be triggered by a finding by a judicial officer on clear and convincing evidence that: 1) a defendant is likely to flee; 2) a defendant has willfully violated a condition of release designed to protect the community; 3) a defendant has committed a crime while on pretrial release; or 4) a defendant has threatened or intimidated, or attempted to threaten or intimidate witnesses.

The final three triggering events set forth relate to a defendant's dangerousness. The Pretrial Release Standards recognize the fact that some defendants on bail pending trial may commit additional offenses and the legal community shares the concern over this problem with both law enforcement agencies and the public. The denial of bail is a serious step, however, which materially decreases a defendant's ability to assist counsel in preparing an adequate defense. In recognition of that fact, the *Standards* provide for the setting of detailed conditions for release, including the setting of any reasonable restriction designed to assure the safety of the community.[57] The *Standards* also provide that violation of those conditions of release can subject the defendant to arrest and require either the setting of new conditions or the scheduling of a pretrial detention hearing within five calendar days.[58]

The second edition Pretrial Release Standards have been considerably tightened. When the first edition *Standards* were adopted in 1968 the nation's criminal justice system was in the midst of a general bail reform movement. The Federal Bail Reform Act of 1966[59] enunciated a firm policy favoring pretrial release. That policy found affirmation in the ABA's first edition *Standards* and reaffirmation in the 1980 second edition.

Still, some noteworthy changes occurred in the second edition. The major changes are reflected in two new standards: 1) standard 10-5.3 dealing

56. STANDARDS, *supra* note 1, at 10.5.
57. *Id.* § 10-5.2.
58. *Id.* § 10-5.7.
59. 18 U.S.C. § 3146 (1976) (amending 18 U.S.C. §§ 3041, 3141-3143, 3568).

with pretrial services agencies; and 2) standard 10-5.9 dealing with pretrial detention, as discussed above. Standard 10-5.3 calls for the establishment of pretrial services agencies in every jurisdiction. The agencies envisioned in this standard would be charged with the responsibility for monitoring and assisting defendants on pretrial release. Such agencies are especially important in performing monitoring functions and in reporting violations of release conditions.

If we are to maintain allegiance to one of our criminal law's fundamental precepts—the presumption of innocence—we must accept the fact that there are those who may well commit additional crimes or abscond while they are on pretrial release. Nonetheless, those incidents can be minimized through a vigorous implementation of the ABA Standards on Pretrial Release, standards which afford adequate safeguards for the community's safety consistent with constitutional requirements.

VIII. CHAPTER 11—DISCOVERY AND PROCEDURE BEFORE TRIAL

The first edition, approved in October 1970, began with the statement that it "proposes more permissive discovery practices for criminal cases than is provided by applicable law in any jurisdiction in the United States."[60] Second, it proposed a "procedure prior to trial which is designed not only to accommodate such discovery but to correct certain general dissatisfactions with criminal litigation."[61]

The first edition focused on pretrial procedures as the centerpiece of its effort. It reasoned that three major impediments to criminal justice could be largely overcome by reforms in procedure prior to trial. These three impediments were: 1) the increasingly cumbersome and exasperatingly time-consuming motion practice, made even more complex by the recent multiplication of issues demanding decision prior to trial; 2) the recent expansion of the right to assigned counsel, causing an influx of lawyers relatively inexperienced in defense work, and aggravated by the concomitant constitutionally articulated demands of "effective assistance" from such counsel; and 3) increasing difficulties in achieving finality in convictions because of greater permissiveness of courts in granting postconviction relief.[62] The drafting group admitted having no delusions that the standards it fashioned would be wholly sufficient to eradicate these impediments, yet it hoped its mechanisms would at least substantially assist in opening the path.[63] As proof of the soundness of the first edition's thrust and success of its frontier-clearing effort, the second edition, approved in August 1978, retains and extends the approach of the original *Standards*.

No substantive changes were required or made in the threshold standard, 11-1.1, which articulated the procedural needs prior to trial, the objectives, and how those needs can be served by: 1) full and free discovery; 2)

60. STANDARDS (1st ed. 1970), *supra* note 45, DISCOVERY AND PROCEDURE BEFORE TRIAL 1.

61. *Id.*

62. *Id.* at 24.

63. *Id.* at 27.

simpler and more efficient procedures; and 3) procedural pressures for expediting the processing of cases. The commentary observes that when the first edition was approved, the specific procedures advanced to meet the objectives set forth in what was then standard 1.1 differed from the then current practice; yet, in the intervening eight years, pretrial procedures have generally evolved toward that model. Still, there is progress to be made, because many jurisdictions continue to have limited discovery as well as cumbersome or slow procedures.

Standard 11-2.1, pertaining to prosecutorial disclosure, has been substantively changed in the second edition to provide for open-file disclosure upon the defendant's request. This is a major change from the first edition, which limited the prosecutor's obligation to a list of specifically enumerated items. The list has been carried into the second edition, but with the caveat that the list is only illustrative. The shift to open-file discovery is attributed to changing attitudes, in part, coupled with greater assurance that protective orders are an appropriate method for coping with the occasional case in which pretrial disclosure might jeopardize victims, witnesses, or evidence. Standard 11-4.4 authorizes protective orders. Also, open-file disclosure is a more effective way to respond to speedy trial requirements, minimizes the need for judicial supervision of basic discovery, and avoids the delays of motion practice and wrangling over the discoverability of particular items. It also contributes to compliance with other constitutional goals, to the defendant's ability to enter a knowing and intelligent guilty plea, and to increased finality of convictions by reducing or eliminating error generated by inadequate information.[64]

Note, however, that open-file disclosure is available only upon a defense request. Defense needs for, and interest in, prosecution disclosures may vary widely; thus, the requirement of request helps the prosecutor obtain a clear idea of information wanted, and avoids wasteful collection of information not useful to individual defendants.

The original standard limited discovery of a co-defendant's statements to cases in which the defendant and co-defendant were to be jointly tried; but that limitation has been omitted from chapter 11 in line with the shift to open-file disclosure.[65]

Standard 11-2.1(b) adds a new subsection (iv) requiring that when the information is within the prosecutor's possession or control, he shall inform defense counsel "if the prosecutor intends to offer (as part of the proof that the defendant committed the offense charged) evidence of other offenses." This serves to ensure pretrial litigation of an issue that might otherwise interrupt the trial.[66]

Standard 11-2.3 provides for additional disclosures upon request and specification. It adds to original standard 2.3 the requirement that the prosecutor shall disclose, upon request, information about lineups, showups, and pictures or voice identification of the accused, as well as other procedures

64. STANDARDS, *supra* note 1, at 11.17-.18.
65. *Id.* at 11.21.
66. *Id.* at 11.27.

described in standard 11-3.1(a)[67] (dealing with the accused). This requirement has been added to make certain that all matters which routinely generate suppression applications will be treated in such a way that collateral issues can be fully investigated and thoughtfully resolved prior to trial.[68]

Standard 11-3.1 contains a significant substantive change from the first edition. Subsection (a) provides that the prosecutor can obtain the defendant's fingerprints, photographs, handwriting exemplars, or voice exemplars merely by requesting defendant to appear for that purpose, whereas the original 3.1 required all such discovery to be subject to judicial supervision. Subsection (b) provides for the judicial officer to order the defendant to provide additional non-testimonial disclosures when the prosecutor meets certain requirements intended to protect fourth and fifth amendment rights. Subsection (c) outlines the discovery procedures the judicial officer may order, relating them to subsection (b). Subsection (d) requires the judicial officer to specify the precise conditions under which such procedures are to be conducted; thus it is intended to prevent the generation of issues that might interfere with prompt disposition of the case or jeopardize the finality of subsequent convictions.

Standard 11-3.2, covering medical and scientific reports, governs prosecutorial discovery of such made by experts engaged by the defense. Paragraph (a) conditions prosecutorial discovery on the fact that the defense has requested and obtained discovery from the prosecution; paragraph (b) exempts the work product of defense counsel and the communications of the defendant; paragraph (c) bars the introduction into evidence either of the fact that disclosures were made or the substance thereof, and also bars the use at trial of information derived from disclosures except to refute the matter disclosed.

Standard 11-3.3 deals with nature of the defense. The original standard called for defense disclosure of the nature of any defense; as revised, it requires the defense to give notice only of witnesses whose testimony bears on the issues of alibi or mental capacity. Also, paragraph (b), patterned after rule 423(a) of the Uniform Rules of Criminal Procedure, bars the introduction into evidence of the fact that disclosures were made and the substance of the disclosures, in addition to barring their use at the trial except to refute testimony of a witness testifying on alibi or insanity.[69]

Standard 11-4.8 is new. It is entitled "third-party disclosures," and is derived from something which had been implicit in original standard 2.5 relating to discretionary disclosures. The new standard clearly distinguishes the mutual discovery between the defense and prosecutor from third-party discovery available to either. Third-party disclosures at court direction require careful judicial supervision to avoid unnecessary intrusion into third-party privacy interests; thus, there are requirements of reasonableness and relevance.[70]

67. *Id.* § 11-2.3(c).
68. *Id.* at 11.33.
69. *Id.* at 11.56.
70. *Id.* at 11.69.

IX. CHAPTER 12—SPEEDY TRIAL

The first edition of this set of standards was given final approval by the House of Delegates in February 1968. Chapter 12 of the second edition was approved in August 1978. It is a tribute to the quality of craftsmanship in the original that no substantive changes in the policy positions comprising the bold-face standards were needed or recommended. This is not to say that nothing happened in this subject area during the intervening decade; to the contrary, a great deal occurred to document the soundness of many of the pioneering principles set forth in the first edition. The reader is urged to review the rich updated commentary to chapter 12 for complete documentation.

A very sketchy summary of the structure of chapter 12, and highlights of developments between the first and second editions, might be merited. In 1967, almost on the eve of presenting the final tentative draft of the first edition for approval, the United States Supreme Court issued its opinion in *Klopfer v. North Carolina*.[71] This landmark case held that the fourteenth amendment made the sixth amendment guarantee of speedy trial applicable to the states. The Court in that case did not have before it the precise issue of which criteria should be used to determine in each case whether the guaranteed right has been violated, for *Klopfer* involved an effort by the state to postpone indefinitely the trial over the defendant's objection. Accordingly, it was not until *Barker v. Wingo*[72] that the Supreme Court prescribed a test to determine constitutional violations. In the intervening five years, the Court had issued two opinions on narrower issues of the problem. One held that a state was not relieved of its speedy trial responsibility just because the defendant was incarcerated in another jurisdiction;[73] the other clarified the fact that the constitutional right does not extend to time prior to arrest or formal charge.[74] Except for one statement in the *Barker* opinion raising a possible question as to the propriety of the standard's proposed "absolute discharge" of a defendant whose speedy trial right has been violated, all four of the Supreme Court's opinions buttressed the first edition. Subsequent to *Barker*, the Supreme Court held in *Strunk v. United States*[75] that "[i]n light of the policies which underlie the right to a speedy trial, dismissal must remain . . . the only possible remedy."[76]

To the credit of the trail-blazing work of the first edition, the Federal Speedy Trial Act of 1974[77] became law on January 3, 1975. Although the bill as finally enacted differs from the position of standard 12-4.1 calling for

71. 386 U.S. 213 (1967).

72. 407 U.S. 514 (1972).

73. Smith v. Hooey, 393 U.S. 374 (1969).

74. United States v. Marion, 404 U.S. 307 (1971).

75. 412 U.S. 434 (1973).

76. *Id.* at 440.

77. 18 U.S.C. §§ 3161-3174 (1976). The Act provides that absolute discharge is at the option of the court, which must consider the seriousness of an offense, the facts and circumstances surrounding dismissal, and the impact of a reprosecution on the administration of justice. *Id.* § 3162(a)(2).

absolute discharge, the overall Act is otherwise generally consistent with Chapter 12.

X. CHAPTER 13—JOINDER AND SEVERANCE

Joinder and severance are procedural issues that affect only a very small percentage of criminal cases, primarily because they are trial issues and relatively few criminal cases go to trial. Of the cases that do go to trial, only those involving either multiple offenses or multiple defendants are affected by joinder and severance rules.

The difficulty in developing rules of joinder and severance stems in large part from the large number of factors that go into the decision of a prosecutor or a defendant to choose to join or sever trials. For example, in one case a prosecutor might decide that a joint trial would be too complicated for a jury to follow, but in another might conclude that the inconvenience to witnesses of multiple trials would require joinder. A defendant who wants to testify as to one charge but not another might prefer separate trials, while another who wants to avoid the expense, delay, and harassment of multiple trials might prefer a single trial.

Considered by many lawyers to be the most technically oriented of all the *Criminal Justice Standards*, the Joinder and Severance Standards, approved by the ABA in August 1968, have been among the most successful in providing guidance to draftsmen of codes and rules in many jurisdictions.[78] The revised standards incorporate and extend the approach of the original standards. The standards in the second edition are, if anything, more interdependent than in the earlier edition. Thus, in any implementation of the *Standards*, they should be adopted as an integral unit and their provisions should be physically located in a continuing sequence.

The revised chapter consists of five parts. Part I, a new section of definitions which are based largely on concepts which appeared in the substantive sections of the first edition, introduces definitions of "related" and "unrelated" offenses. "Related" offenses are tied together in one or more ways and, as a group, correspond roughly with the class of offenses that have traditionally been joinable. Rule 8(a) of the Federal Rules of Criminal Procedure uses different terminology to identify substantially the same concept.[79]

Part II deals with joinder and includes matters which were largely contained in Part I of the first edition. It does, however, contain significant changes from the earlier edition, such as those in standard 13-2.1, joinder of offenses. The original standard (1.1) permitted joinder only of related offenses, while the revised standard would permit unlimited joinder of both related and unrelated offenses. This expansion, however, is subject to an absolute right to severance of unrelated offenses, by either prosecution or

78. Report With Recommendations to ABA House of Delegates, 1978 Annual Meeting, Report 108A at 12.

79. Related offenses are based "on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." FED. R. CRIM. P. 8(a).

defense, as set forth in standard 13-3.1(a).[80]

It should be noted that 13-2.1(a) requires that when offenses are joined in one accusatory instrument, each offense must be stated in a separate count. This requirement is based on constitutional concerns arising from the sixth amendment right to notice of the nature and cause of the accusation.

Standard 13-2.2, joinder of defendants, has been conformed to the change in standard 13-2.1 by the addition of authority for unlimited joinder of offenses and by the explicit authorization of applications, by either prosecution or defense, to join defendants for trial.

Part III deals with severance. A modification of standard 13-3.1 which would grant a right of severance to both the prosecution and the defense in those cases in which unrelated offenses have been joined for trial, is designed to conform this section to the changes in standard 13-2.1 and has been discussed above.

Part IV outlines the authority of the court to act on its own motion. Standard 13-4.1 is derived from first edition standard 3.1(a). The original standard provided that a judge could order consolidation of charges for trial if the offenses—and the defendants if there is more than one—could have been joined in a single charge. The revised standard limits the court's authority to join offenses or defendants *sua sponte* to cases in which no party objects, because the parties will be better able than the court to foresee the risks of prejudice from a joinder of offenses or defendants.[81]

Part V, dealing with the requirement for an adequate record, is new and contains only one standard. The standard adds the requirement that the court make a record of its reasons for granting or denying any motion. The failure of courts to articulate the basis for their decisions on joinder and severance issues makes it difficult for appellate courts to subject joinder and severance decisions to meaningful review and for trial courts to understand the factors that influenced the outcome in previous cases.

XI. CHAPTER 14—PLEAS OF GUILTY

The first edition of these standards was approved in 1968. At that time the ABA took the position that the practice of negotiating charge and sentence concessions, which accounts for over ninety percent of all criminal dispositions in some jurisdictions, served a useful function both for the criminal defendant and for society. While the second edition of the *Standards* has deleted consideration of the impact of plea negotiation on court dockets as a factor to be considered in final disposition of a plea,[82] the practice nevertheless has a beneficial impact on administration of the courts by freeing resources which would otherwise be devoted to the conduct of trials. Indeed, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving both the quality

80. *Cf.* UNIFORM R. CRIM. P. 471(d) (allowing joinder of unrelated offenses upon motion of defendant who makes showing that "failure to try the charges together would constitute harassment, unless the court determines that . . . joinder would defeat the ends of justice.").

81. *See* UNIFORM R. CRIM. P. 473(a).

82. *See* STANDARDS, *supra* note 1, § 14-1.8.

of the trial process itself and the meaningfulness of the presumption of innocence.

While recognizing the potential benefits of plea negotiations, however, the drafters of the first edition also recognized that often such discussions were conducted in a secretive manner that gave the appearance that justice was not being done. Anticipating the Supreme Court's 1971 declaration in *Santobello v. New York*[83] that plea bargaining is "an essential component of the administration of [criminal] justice,"[84] the first edition argued that the practice should be brought into the open and that effective procedures for control of the process should be developed. This position has been overwhelmingly accepted.

The second edition, while retaining the basic philosophy of the earlier standards, has been amended to reflect changes in the plea negotiation process during the past decade. These changes, which will be discussed in some detail below, include increased standardization of procedures and greater emphasis on ensuring understanding on the part of a defendant involved in the process. A major new emphasis in the second edition provides for judicial participation in the plea negotiation process.

Standard 14-1.1 ("pleading by defendant; alternatives"), like its first edition counterpart, deliberately omits reference to the judge's authority to refuse a guilty plea. Once a plea is determined to be knowing, voluntary, and accurate, there normally is no justification for the court to refuse it. Similarly, these standards do not take a position on whether courts should have authority to approve charge concessions of a prosecutor.

The second sentence of paragraph (a) requires the defendant personally to enter the plea. This requirement is a necessary corollary to decisions holding that a guilty plea must be rejected unless the defendant, in tendering the plea, intelligently and voluntarily relinquishes certain fundamental constitutional rights.[85]

The only change from the original edition is a provision that specifically recommends that the views of the victims be taken into consideration before a court accepts a plea of nolo contendere. This is consistent with the recommendation that in accepting a nolo plea "the views of the parties . . . and the interest of the public in the effective administration of justice"[86] should also be considered.

Standard 14-1.3 ("aid of counsel; time for deliberation") has been amended in paragraph (b). The Supreme Court has recognized the right of a defendant to proceed without legal representation.[87] In order to emphasize the need for valid waiver of counsel, however, the language of paragraph (b) has been amended. Paragraph (b) of the original standard referred to a defendant who is "without counsel"; that phrase has been amended to refer

83. 404 U.S. 257 (1971).

84. *Id.* at 260.

85. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969).

86. STANDARDS, *supra* note 1, at 14.6-.7.

87. Faretta v. California, 422 U.S. 806 (1975).

to a defendant "who has properly waived counsel pursuant to these standards."

The original standard also stated that paragraph (b) should apply to a "serious offense." Reference to serious offenses has been deleted in the revision of paragraph (b) because the values expressed in this standard are considered fully applicable to both felony and misdemeanor prosecutions. Adherence to paragraph (b) is not deemed essential in petty offense cases where there is no possibility of incarceration.[88]

Standard 14-1.4 ("defendant to be advised") has been substantially expanded to ensure that a defendant who offers to plead guilty or nolo contendere is given all of the advice constitutionally required and other useful information as well. In addition to stylistic changes, a number of substantive changes have been made.

Paragraph (a) of standard 14-1.4 now contains the requirement that the court address the defendant personally in open court and determine that the defendant understand the matters under discussion.

Standard 14-1.4(a)(i) provides a more explicit statement of what the defendant should be told by using the phrase "nature and elements of the offense to which the plea is offered" rather than simply "nature of the offense" which appeared in the first edition. This change was mandated in certain cases by the Supreme Court decision in *Henderson v. Morgan*,[89] which held that a plea to second-degree murder was involuntary where the defendant had not been informed that intent to cause death was an element of the crime.

Standard 14-1.4(a)(iv) is new except for the requirement of a statement to the defendant that by pleading guilty he or she waives a right to a jury trial. The second edition requires that the judge make clear the fact that the defendant also waives other constitutional rights, waiver of which must be intelligent and voluntary.

Standard 14-1.4(a)(v) is also new and requires that the court notify the defendant that he or she waives the right to object to the sufficiency of the charging papers or to illegally obtained evidence (unless such right is reserved).

Standard 14-1.4(b) is new as well. It is intended to ensure that the defendant understands the procedures and directs the court either to ask the defendant to restate the information being considered, or to take "such other steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences."

Standard 14-1.4(c), also a new paragraph, directs the court to refuse a plea when it appears that a defendant who is represented by counsel has not had effective assistance of counsel.

Three changes have been made in standard 14-1.5 ("determining voluntariness of plea"). First, there has been added to the second sentence the phrase "the defendant," thus making it clear that the court should inquire of

88. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).
89. 425 U.S. 637 (1976).

the defendant, as well as of defense counsel, concerning possible plea discussions and plea agreements. In addition, the second sentence of the standard now specifically requires that the parties disclose "what [plea] discussions were had." Finally, the third sentence of the standard has been rewritten. In the first edition, this sentence stated that the court should advise the defendant that charge and sentence recommendations that are a part of a plea agreement are not binding on the court. This provision was misleading, however, because the defendant, according to original standard 3.3(b), was accorded an absolute right to withdraw a guilty plea in which charge and sentence concessions, recommended by the prosecutor and initially concurred in by the court, were later rejected. As revised, the third sentence contains a cross-reference to standard 14-3.3(g), with the recommendation that the defendant be advised consistent with this provision. Standard 14-3.3(g) sets forth the circumstances in which withdrawal of a plea is allowed when charge or sentence concessions recommended by the prosecutor are disapproved by the court.

Standard 14-1.6 ("determining accuracy of plea") has been revised to require the finding of a factual basis for the nolo contendere plea as well as for the plea of guilty. Paragraph (b), which is new, states that the judge may require the defendant to make a statement concerning the commission of the offense when such a statement is necessary in order to establish a factual basis. Paragraph (c), which is also new, requires that special care be taken in those circumstances in which the defendant enters a plea but denies culpability.

Several refinements have been made in standard 14-1.8 ("consideration of plea in final disposition"). The first emphasizes that a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. This represents the shift in the second edition to greater consideration of the factors relating to an individual defendant in disposition of a plea. Although the first edition was silent on the effect of a plea on the severity of the sentence imposed, the major factor to be considered was "the effective administration of criminal justice." By contrast, the factors in the second edition are "the protection of the public, the gravity of the offense, and the needs of the defendant." Thus, although congestion in criminal court calendars in many parts of the country remains a significant problem, these standards no longer express the view that it is permissible to grant charge and sentence concessions to defendants solely for the purpose of processing cases through the system.

A minor substantive change in standard 14-2.1 ("plea withdrawal") provides that "the court *should* allow" withdrawal of a plea before sentence where the defendant's reasons are fair and just and the prejudice to the prosecutor is minimal. The first edition stated that "the court in its discretion *may* allow" withdrawal of such a plea. This change in emphasis reflects the belief that prior to sentencing, when there is a basis for the defendant's motion and an absence of compelling prosecutorial reason for its denial, withdrawal of a plea of guilty or nolo contendere normally should be allowed.

Three clauses, none contained in the first edition, have been added to

standard 14-2.2 ("withdrawn plea not admissible"). First, the standard now provides that "any statements made by the defendant in connection with entering such a plea of guilty or nolo contendere" may not later be used against the defendant if the plea is either not accepted or withdrawn.

A second new clause provides an exception to this general rule. Thus, the standard permits statements of a defendant made while entering an unaccepted or withdrawn plea to be admitted against a defendant in a subsequent "criminal proceeding for perjury or false statement if the statements were made by the defendant under oath, on the record, and in the presence of counsel." This change parallels the Federal Rules of Criminal Procedure.[90]

The third new clause, "or civil action or administrative proceeding," was added to make this standard consistent with other standards dealing with the inadmissibility of plea discussions and plea agreements when the underlying plea is either not accepted or is withdrawn.

There are several changes in standard 3.1 ("propriety of plea discussions and plea agreements"), the first of which makes it clear that "[t]he prosecuting attorney may engage in a plea discussion with counsel for the defendant for the purposes of reaching a plea agreement." This revision reflects the widespread acceptance of plea discussions between prosecution and defense.

Also, a new subparagraph has been added which recommends that the views of victims and law enforcement officials be considered before the prosecutor enters into plea agreements. This is regarded as an essential requirement, lest victims and police lose their respect for the criminal justice system and become unwilling to cooperate fully when needed.

Standard 3.3 ("responsibilities of the judge") has undergone considerable changes, many of which, however, involve nothing more than the incorporation of provisions which had appeared in the first edition of the Function of the Trial Judge. Several paragraphs of the standard, however, are almost entirely new.

The thrust of these new provisions is to allow a limited role for the judge in the plea-negotiation/plea-agreement process. The parties may request to meet with the court either to present or to discuss a plea agreement. If the court consents to a plea conference, appropriate persons may be required to testify, including the defendant and alleged victim. Finally, when a plea agreement has not been reached, the judge may inquire of the parties whether plea discussions have taken place and, if not, may adjourn the proceedings to enable such discussions to occur. These provisions are contrary to the first edition, which stated that "[t]he trial judge should not participate in plea discussions."

In the original edition, the defendant was permitted to withdraw a guilty plea or plea of nolo contendere whenever the court tentatively concurred in contemplated charge or sentence concessions and later changed its mind. This revised edition contains a much more detailed provision related to plea withdrawal when anticipated concessions are not received. The stan-

90. FED. R. CRIM. P. 11(e)(6).

dard contemplates that the defendant will be expressly advised when the plea is entered whether withdrawal of the plea will be permitted if the charge or sentence concessions are rejected.

XII. CHAPTER 15—TRIAL BY JURY

The first edition was approved in 1968, and the second edition in August 1978. During that decade, much occurred to provide experience and data to assist in supporting a number of substantive changes in the original standards. The total product represented by this particular chapter is an especially valuable reference which could not help but serve as a constant tool for judges, prosecutors, and defenders alike.

The introduction to the first edition[91] begins by telling the reader that the Trial by Jury standards start with the threshold question of when there should be a right to jury trial and conclude with the question of when impeachment of the jury's verdict should be permitted. The introduction emphasized the importance of guidelines as to when the jury can or must be used, how jurors are selected, how the trial should be conducted to facilitate the jury's proper role, how to assist the jury's deliberations and yet have essential controls, and whether the jury's verdict need be unanimous. Despite the fact that the bulk of criminal cases are processed without jury trial, usually the most controversial and far-reaching involve jury trials. In many which do not wind up in a jury trial, the very fact that the potential of a jury trial looms in the picture will often be a critical factor in disposition. Also, of course, article III and the sixth amendment to the Constitution preserve the right of jury trial.

The second edition retains the major structure of the first edition, except for the deletion of original Part III pertaining to Juror Orientation and Compensation. The two standards under that heading were eliminated in deference to the fact that since the approval of the first edition, the ABA Commission on Standards of Judicial Administration had formulated standards relating to Trial Courts which were approved by the House of Delegates in 1976, and which appropriately embraced the subject for both civil and criminal cases.[92]

Major changes were made in standard 15-1.1 ("right to jury trial"), the keystone of the chapter, so that it now reads as follows:

> Jury trial should be available to a party, including the state, in criminal prosecutions in which confinement in jail or prison may be imposed. The jury should consist of twelve persons, except that a jury of less than twelve (but not less than six) may be provided when the penalty that may be imposed is confinement for six months or less. The verdict of the jury should be unanimous.

In this brief standard, the significant revisions include: 1) deletion of an earlier recognition of the propriety, barring constitutional restriction, of denial of jury trial for "petty offenses"; 2) deletion of acceptance of trial of

91. STANDARDS (1st ed. 1968), *supra* note 45, TRIAL BY JURY, at 1-2.
92. *See* STANDARDS, *supra* note 1, at DT-31.

lesser offenses without a jury; 3) limiting the use of juries of less than twelve to petty offenses; 4) imposing a minimum of six members for any jury less than twelve; and 5) elimination of the possibility of less than unanimous verdicts, except where parties properly consent. Each of these substantive revisions merits examination of its rationale.

When the first edition was already in page proofs, the United States Supreme Court decided *Duncan v. Louisiana*,[93] holding the sixth amendment right to jury trial applicable to states through the fourteenth amendment. In effect this meant entitlement to jury for "serious crimes" but not "petty offenses." It did not precisely draw the line between those categories, but indicated that in the federal system petty offenses are those punishable by no more than six months in prison and $500 fine.[94] In 1970, *Baldwin v. New York*[95] confirmed the matter by holding that no offense could be considered petty if imprisonment of more than six months could result.[96]

As revised, the standard no longer recognizes the propriety of denying jury trials in lesser offenses, even if the accused is accorded a right to trial de novo upon appeal. The main reason for the change in posture of the standard was the adoption in 1976 of a new policy that there should be a right of jury trial in all criminal prosecutions in which the penalty of jail or prison may be imposed. It was contended that such punishment should rest on a finding of guilt satisfying the conscience of the lay citizenry.

The change in the standard regarding size of the jury is primarily to accommodate decisions of the Supreme Court that were handed down between the first and second editions.[97]

As to the matter of unanimous verdicts, the revised standard was mandated by a change in ABA policy in 1976, based upon the recommendation of the ABA Commission on Standards of Judicial Administration. Given that the *Standards* are suggestive rather than mandatory, however, and given that the Supreme Court has clearly recognized that states need not require unanimous verdicts,[98] the change will probably be of limited persuasion.

Standard 15-1.2, covering waiver of trial by jury, contains only one substantive change from the first edition, namely to include approval of the prosecutor as one of the conditions for waiver. It should be noted that standard 15-1.2 still permits waiver by an oral statement for the record; this is consonant with the Uniform Rules of Criminal Procedure, but contrary to the Federal Rules of Criminal Procedure.

Related to the subject of standard 15-1.2 is standard 15-1.3 dealing with waiver of either a full or unanimous jury. The change made here is to add a provision for waiving the requirement of a unanimous verdict by the defendant. A requirement of prosecutorial concurrence has not been included be-

93. 391 U.S. 145 (1968).
94. *Id.* at 161.
95. 399 U.S. 66 (1970).
96. *Id.* at 73-74.
97. *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978); Williams v. Florida, 399 U.S. 78 (1970).
98. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972).

cause the same considerations as exist with standard 15-1.2 are not present. Waiver under this standard is a possibility in three situations: 1) pretrial; 2) during trial; or 3) when one or more jurors have been excused either during trial or during deliberation.[99]

Part II articulates standards relating to selection of the jury. Standard 15-2.1, dealing with selection of prospective jurors, retains without change the basic principle that names of those who may be called "should be selected at random from sources which will furnish a representative cross-section of the community."

Subsections (c) and (d) of standard 15-2.1 have been revised from the first edition to take advantage of interim experience and to make more specific the grounds for eligibility of individual prospects for jury service, as well as the grounds for excusing persons and granting temporary deferrals. For example, one revision extends eligibility to those who have a criminal record but are not "serving a criminal sentence or on probation or parole, and are not defendants in a pending prosecution for an offense other than an infraction"; thus, unlike the first edition, standard 15-2.1 would not *per se* exclude a convicted felon no longer incarcerated or on probation or parole. However, trial judges should look with favor on prosecutors' challenges for cause of any particular prospective juror with a felony record who, as an individual, does not appear to be acceptable as a prospective juror.

Standard 15-2.2 concerns the list of prospective jurors, and contains three revisions of the first edition standard: 1) dropping the requirement that the parties must request the list as a condition to receiving it; 2) expanding the information included; and 3) designating the time period within which the parties must receive it.

Standard 15-2.4 deals with voir dire examination. A very substantial change has been made in the second edition, in that the standard now makes it clear that direct questioning by counsel is a right. The crucial part reads: "Interrogation of jurors should be conducted initially and primarily by the judge, but counsel for each side should have the opportunity, subject to reasonable time limits, to question jurors directly, both individually and as a panel . . . . It is the responsibility of the judge to prevent abuse of voir dire examination."

One other standard in Part II deserves mention. Standard 15-2.6 concerns peremptory challenges, and in the first edition it simply read: "The number of peremptory challenges and the procedure for their exercise should be governed by rule or statute." To this, the second edition added two subsections as follows:

> Standard 15-2.6. Peremptory challenges
> (a) Peremptory challenges should be limited to a number no larger than ordinarily necessary to provide reasonable assurance of obtaining an unbiased jury, but the trial judge should be authorized to allow additional peremptory challenges when special circumstances justify doing so.

99. Waiver of a unanimous jury was upheld in United States v. Vega, 447 F.2d 698 (2d Cir. 1971).

(b) The procedure for exercise of peremptory challenges should permit challenge to any of the persons who have been passed for cause.

. . . .

These changes conform standard 15-2.6 to the policy established by the ABA in 1976 in the Judicial Administration Standards on Trial Courts, thus suggesting greater uniformity in limiting the number of such challenges by providing a flexible guideline based on the factors set forth.

Part III concerns special procedures during jury trial. Standard 15-3.1, covering custody and restraint of defendants and witnesses, contains a revision in paragraph (b) which now reads: "The trial judge should not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner, unless specifically waived by the defendant." The revision specifically provides for waiver in order to comport with *Estelle v. Williams*.[100] The standard also is in harmony with *Illinois v. Allen*,[101] which was handed down after the publication of the first edition.

Standard 15-3.6, relating to jury instructions, contains one significant revision in that the following has been added: "Instructions to the jury should be not only technically correct but also expressed as simply as possible and delivered in such a way that they can be clearly understood by the jury." This section implements the ABA's increasing concern that jury instructions are too legalistic and too often unintelligible to a lay jury. This concern was also heightened by findings of a research group which reported studies of jurors in Florida, indicating, among other things, that an average of only 70% of the instructions tested were comprehended.[102]

In all other respects the additional portions of the first edition standard on this vital subject area remain the same, although the commentary of the second edition contains excellent data summarizing developments in the state of the art during the intervening ten years.

Part IV, covering jury deliberations and verdict, represents the final substantive change in Chapter 15. This occurs in standard 15-5.1 which covers the taking by jurors of materials into the jury room. A new clause has been added to permit copies of jury instructions to be sent to the jurors at the judge's discretion if both parties consent. The rationale favoring this change in the standard is that access to written instructions generally helps the jurors to refresh their recollections as to issues, as well as to the applicable law, if they sense a need for such.

XIII. CHAPTER 18—SENTENCING ALTERNATIVES AND PROCEDURES

The first edition of this set of standards was approved in August 1968. A separate volume relating to probation was approved in August 1970. Both of these, for reasons of logic and interrelatedness, have been merged into chapter 18, which received final ABA aproval in August 1979. This chapter has proven to be one of the most important in the entire series of *Criminal*

100. 425 U.S. 501 (1976).
101. 397 U.S. 337 (1970).
102. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUD. 478, 482 (1976).

Justice Standards, for it deals with the ultimate question of the criminal justice process—what happens to the convicted or guilt-pleading defendant?

In the decade between the first and second editions of the standards comprising chapter 18, much has happened in that subject area. There is probably no other area of criminal justice that has sparked as intense a debate over fundamental assumptions. The debate has included the basic questions of the purpose of sentencing, the length of sentences, where the decision to sentence should lodge, how to deal with disparities in sentencing, and whether parole should be abolished.

Notwithstanding this ferment, chapter 18 is characterized by continuity rather than change. The response has been conservative for two reasons: 1) the continuing validity of the premises that shaped this first edition; and 2) the greater need for reform in practice than in theory.

Despite the ABA's conservative posture against scrapping basics of the original edition, there remain valid criticisms of contemporary sentencing practices, including: 1) the pervasiveness of sentencing disparities; 2) the excessive length of sentences; 3) the standardless character of the discretion given to sentencing courts; 4) the informal nature of the presentence investigation as well as the limited penetration of due process safeguards into the sentencing process; and 5) the dangers of using the uncertain standard of rehabilitative progress as a measure for determining the length of confinement. Consensus has largely supplanted the debate on these matters, and the evidence amply documents unrealistic expectations placed on the "individualized treatment model" of sentencing.[103]

It would be confusing and counterproductive to attempt to catalog all of the individual changes made in chapter 18. This particular chapter exceeds 550 pages. The updated commentary is encyclopedic in its comprehensive treatment and rational disposition of the myriad developments in the sentencing area during the period between editions. It would likewise be a disservice to purport to summarize its contents in any manner which might imply that there is no need to study carefully the material in its entirety. In fact, the very nature and importance of the problems in sentencing should make such a study vital to interested representatives of the legislative, judicial, and executive branches, as well as to members of the public who have entertained and voiced concerns in this field. Consequently, in this section, the effort will be limited to highlighting major retentions as well as changes and suggesting the more significant rationale supporting such.

Part I articulates ABA policy as to where the sentencing authority should lie. Despite the ferment of a decade since the first edition, chapter 18 reiterates the ABA policy against jury sentencing and reaffirms its stand that sentencing properly should remain essentially a judicial function.[104] Thus, standard 18-1.1 explicitly provides that "the jury's role should not therefore extend to the determination of the appropriate sentence." Added, however, is this qualifier: "These standards do not deal with whether the death pen-

103. STANDARDS, *supra* note 1, at 18.6.

104. *Id.* § 18-1.1.

alty should be an available sentencing alternative and, if so, who should participate in its imposition."[105]

Part II of chapter 18 outlines the statutory structure of sentencing and articulates the principles and policy positions which the *Standards* recommend. Part III covers the sentencing guideline drafting agency recommended in Part II and incorporates what the ABA endorses as essential principles to guide the drafting agency in providing needed assistance to sentencing courts in the exercise of their discretion. Because these two parts are interdependent, they will be considered together.

Standard 18-2.1 restates the recommended limited role of the legislature carried over from the first edition, including the ABA's long-standing policy against legislatively mandated sentences. The use of the word "limited" is a change in emphasis rather than philosophy, yet deemed essential in light of the recent trend toward determinate sentencing, for judicial and parole officials should be vested with discretion to respond to the substantial variety of offense and offender combinations that inevitably arise.[106] This standard also reiterates the ABA's recommendation that "[a]ll crimes should be classified by [the legislature] for the purpose of sentencing into a small number of categories which reflect substantial differences in gravity. For each such category, the legislature should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this."[107] This is an essential starting point for reform in any jurisdiction. The major substantive change in standard 18-2.1 is to recommend that legislatures establish a centralized sentencing guideline drafting agency to develop specific sentencing criteria.

Standards 18-3.1 through 18-3.5 (Part III) are designed to provide for the guideline drafting agency proposed in Part II and are completely new, except to the extent that they incorporate principles enunciated in Part II. Basically, the agency is to be in the judicial branch. Its authority is to "promulgate presumptively appropriate sentencing ranges within the statutory limits,"[108] in order to shape judicial discretion, not replace it with mechanical rules.

Standard 18-3.1 also outlines essential criteria to apply to whatever sentencing guidelines are drafted, such as recognition that deserved punishment need not always consist of institutional confinement; hence guidelines should embrace a variety of alternatives, including probation, "split sentences," fines, restitution, community service, and other intermediate sanctions. These guidelines should focus on more than the fact of conviction, and should seek to relate appropriate combinations of offense-offender characteristics to presumptive sentencing ranges. They should also seek to reflect current community consensus about the relative gravity of offenses.

Standard 18-3.2 details a set of principles to guide both the drafting agency and the sentencing court in exercising their respective discretions. It

105. *Id.*
106. *Id.* at 18.27.
107. *Id.* § 18-2.1(a).
108. *Id.* § 18-3.1(a).

also includes numerous illustrative factors—mitigating as well as aggravating—to assist the sentencing court in applying such difficult elements to applicable guideline ranges in appropriate cases.

Although standard 18-3.2 is new in articulating an ABA policy advocating legislative authorization for, as well as guidance in structuring discretion for, both sentencing guidelines and the sentencing function, the principles recommended are not all new. Some are well-established ABA policies carried over from the first edition, while others are modifications of earlier positions adjusted to accommodate intervening case law or other developments deemed authoritative. It is significant to note that standard 18-3.2's rejection of the offender's need for rehabilitation or treatment as a justification for incarceration is a major substantive change from the first edition. However, this rejection of the "rehabilitation model" should not be construed as the ABA's rejection of rehabilitation as a proper goal for corrections, but it does mean that chapter 18 takes the position that the concepts of punishment and treatment should be kept separate; thus, the length of confinement in the sentence should not relate at all to any consideration of rehabilitation.[109]

Standard 18-2.4 articulates principles governing a range of sentencing alternatives between supervised probation and total confinement. Here, the only change is to accord greater emphasis to community service orders and restitution. Since the original edition there has been a noteworthy legislative trend toward use of intermittent confinement[110] and community service as an alternative to prison for the nondangerous offender. Similarly, restitution as a sanction is currently receiving unprecedented attention as a byproduct of the shift in focus to crime victims.

Sentences involving total confinement, including special enhanced terms for habitual or dangerous offenders, are addressed in standard 18-2.5, and two noteworthy substantive modifications from the first edition have been made. First, as previously indicated, rehabilitation has been deleted as a justification for total confinement. Second, the standard has been modified to track the concept developed by the National Commission for Reform of Federal Criminal Law (Brown Commission) which proposes federal criminal code provisions covering enhanced terms for special offenders.[111]

The first edition has recognized that, notwithstanding some public perceptions to the contrary, sentences within the United States tend to be excessively long. This was attributed in part to a natural legislative desire to authorize sufficiently harsh or long penal terms where the offender was deemed dangerous, habitual, or what some might label a professional criminal.[112] Despite legislative motives, sentencing courts, lacking more precise legislative guidance, tended to gravitate toward the statutory midrange of

109. *Id.* at 18.63-.67.

110. At least 17 states have legislation authorizing intermediate sanctions, and 42 states and the proposed federal criminal code now authorize work release programs for felons. *Id.* at 18.104-.105.

111. Id. at 18.118.

112. STANDARDS (1st ed. 1968), *supra* note 45, § 2.5(b).

the authorized term where the offender appeared to lack either mitigating or aggravating factors.

To confront this problem, the first edition advocated a two-tier statutory sentencing structure, with longer sentences designed for offenders deemed to fall in the special categories. The first edition conditioned endorsement of the two-tier statutes on adequate legislative provisions to delineate the special offenders, yet the chapter 18 Task Force found evidence that existing statutes reflect such shortcomings as overbreadth, vagueness, and improper criteria. Moreover, there have been increasing signs of difficulty or impossibility in assessing dangerousness, which have created serious problems.

Standard 18-2.5(b) now states: "that a sentence in excess of a specified percentage of such maximums could not be imposed in the absence of a specific finding by the court that the offender constituted a dangerous or persistent offender as defined by it." Also, this standard specifies that, rather than the legislature shaping its penal code to focus on special offenders, it should incorporate in the statute instructions to the sentencing guideline agency to develop the essential criteria for use by the sentencing court in distinguishing such special offenders from the broader spectrum of offenders.

It should be noted that there is one very troubling type of special offender legislation still existing in about half of the jurisdictions in the United States, which the framers of chapter 18 admittedly have not addressed adequately through its revisions. These are the so-called sexual psychopath statutes. The commentary to standard 18-2.5 summarizes the broad spectrum of problems, indicating that they transcend the procedural concerns with which the standards primarily deal.[113] Since publication of the second edition, however, the ABA Standing Committee on Association Standards for Criminal Justice has received private foundation funding and has already launched Phase I of a major project which envisions as its final product a comprehensive set of criminal justice standards in the mental health area.[114]

Standard 18-2.8, entitled "organizational sanctions," is a completely new addition to chapter 18, except for the incorporation of parts of the first edition standard 2.7(g) authorizing special enhanced-fine schedules for corporations. It is quite comprehensive and deals with the numerous special problems of imposing sentences for crimes committed by organizations, commonly referred to as "white collar" crimes. The widespread surfacing of illegal corporate conduct during the decade following the first edition created the need to articulate standards to cope with special problems not adequately embraced in sentencing persons, as distinguished from organizations. Some of the problems stem from the magnitude of the offenses, their national and even international aspects, their longstanding, continuing nature, and the nature and numbers of victims. Examples of such crimes are consumer fraud, environmental harm, domestic and foreign bribes as incidents of doing business, endangerment to workers, and securities fraud. A

113. STANDARDS, *supra* note 1, at 18.131-.136.

114. Information obtained from ABA Standing Committee staff headquarters, Washington, D.C.

highlight summary of the approach taken by this new set of standards will serve to indicate aspects of the uniqueness and complexity of the problems.

Standard 18-2.8(a) sets the stage by stating that "[t]he interests of society and the need for fairness to the defendant require greater coordination of criminal and civil remedies and greater flexibility in the discretion accorded sentencing authorities to fit the punishment to the crime." Examples of existing sentencing alternatives that require such legislative clarification and codification are: restitution, special enhanced-fine schedules, disqualification of corporate officials from office in the specific organization, notice of conviction to persons affected, and continuing judicial oversight.[115]

Finally, standard 18-2.8 contains three conditions to which all of its enumerated sanctions are made subject: 1) restitution, special fines, and continuing judicial oversight should not be imposed in cases, such as arise under antitrust or securities laws, where statutory provisions for civil actions seeking equitable relief, money damages, or civil penalties exist "to accomplish the remedial or deterrent purposes of such sanctions"; 2) the imposition of such sanctions should be preceded by a full adversary hearing as outlined in standard 18-5.4, using the "preponderance of the evidence" standard as the burden of proof; and 3) appellate review as to the reasonableness of penalties and conditions imposed will be available "to the same extent it applies to other sentences generally under these standards."

Part IV focuses on the use of total confinement. Most of the standards are restatements of the first edition, modified only by stylistic changes or minor fine-tuning to accommodate the second edition's new concept of sentencing guidelines. However, one standard is new and involves major policy positions on the controversial subjects of indeterminacy and whether parole should be eliminated. This is standard 18-4.1, which provides as follows:

> Excessive indeterminacy now characterizes many penal codes and tends to produce both unwarranted disparities among offenders and unnecessary anxiety on their part about the time of their release. However, because both "indeterminate" and "flat time" sentencing structures in their extreme forms are seriously defective, the legislature should exercise caution in curtailing indeterminacy in order to prevent determinate sentencing reforms from increasing the average time actually served by most offenders. In particular, two precautionary principles should be observed in any penal code revision:
>
> (a) An early release mechanism independent of the sentencing court should be retained to achieve a variety of purposes which require an agency having a general oversight capacity; and
>
> (b) It is desirable that the proportion of indeterminacy in the sentence increase as the sentence's length increases. To implement this principle standard 18-4.3 proposes criteria with respect to the degree of indeterminacy recommended for sentences of increasing length.

Chapter 18 endorses a compromise position with respect to indetermi-

115. *See* STANDARDS, *supra* note 1, at 18.161-.163.

nacy and to the continued use of parole agencies. The sentencing court, acting in accordance with sentencing guidelines, will establish a sentence which will fix the range of indeterminacy; the parole authorities, acting pursuant to a separate but compatible set of guidelines promulgated by them, will determine the offender's release. It is assumed that a presumptive release date—to minimize undesirable uncertainty—will be set by the parole agency at an early point in the offender's confinement.

Part V deals with the informational basis for the sentence. Although this segment contains what appear to be only modest revisions to the first edition version, an examination of these revisions and the rationale therefor will indicate that their implementation could have tremendous impact upon reforming the sentencing process.

Standard 18-5.1 enumerates the general principles that should govern presentence reports. Subsection (b) adds to the first edition a statement that the legislative authorization for the court to call for a presentence investigation and report in every case, and the requirement for such in certain categories (enumerated in the original standard), should be observed "unless the defendant or defense counsel waives production of the report and the court specifically finds that it has sufficient information to exercise the discretion accorded to it."

Another substantive change is the addition of subsection (c) which requires that all material information in the report should be factual and verified by its preparer, who should be available at the presentence conference to respond to challenges to the verification. According to the standard, the inability to establish verification should cause the court to refuse to consider that information at the sentencing hearing.

Subsection (d) also is new, and consists of detailed standards covering the format, contents, and written presentation of presentence reports. It includes both short-form and full reports as well as guidelines for when each is appropriate. Related to (d) is subsection (e), also new, which covers the precise preparation and format of presentence reports in jurisdictions where a guideline drafting agency exists. This includes requirements that information about the offender and offense, as well as mitigating or aggravating factors, be expressly keyed to the guidelines criteria. Chapter 18 has added yet another subsection which seems to be targeted to the parole agency which chapter 18 favors retaining:

> (f) The format of the presentence report should be designed with a view to the likelihood of its use by dispositional agencies other than the sentencing court that are dependent on the information developed at sentencing. In turn, the report should also apprise the sentencing court of the likely impact of any guidelines utilized by the agency administering early release upon the case of the offender before the court.

These additions were motivated by several factors. First, the recommended guideline system requires careful integration of the data gathered with the criteria specified in the guidelines. Second, it was considered essential that the probation officer make an independent evaluation of the offense

and all aggravating as well as mitigating factors. A third consideration was that the "general retreat from a rehabilitative model" which has occurred since the first edition necessitates reconsideration of the nature and scope of the presentence inquiry.

Part VI, pertaining to sentencing procedures, requires only brief mention regarding the changes between the first and second editions. The most significant substantive revisions occur in standard 18-6.4 which covers the sentencing proceeding, which is to be held "[a]s soon as practicable after the determination of guilt and the examination of any presentence reports." Basically, the revisions are designed to incorporate minimum procedural standards for the sentencing hearing. Standard 18-6.4 also provides for a hearing—not to become a minitrial—on "all material factual disputes arising out of any presentence reports or the evidentiary proffers of the parties." Another substantive modification is the suggestion in standard 18-6.4(c) that the court use "the preponderance of evidence" standard on all controversial issues, although standard 18-6.5 adopts a more rigorous "clear and convincing" evidence standard for sentencing hearings involving exceptional offenders subject to special long-term guidelines.

Part VII covers standards dealing with "Further Judicial Action," such as authority to reduce sentences,[116] modification of sentences not involving confinement or involving partial confinement;[117] modification of sentences involving fines, nonpayment, or other violations of sanctions;[118] and finally, revocation of probation.[119] The last mentioned is new, incorporating applicable standards from the first edition probation standards, but containing substantial modifications to accommodate the United States Supreme Court decision of *Gagnon v. Scarpelli*,[120] which came some years after the first edition. In brief, this case extends to probation revocations the same procedure made mandatory for parole revocations by *Morrissey v. Brewer*.[121]

The final segment of chapter 18 is Part VIII, entitled "Development of Sentencing Criteria," which continues the first edition endorsement of sentencing councils, but modifies the standard to indicate they should fill a role as a "useful supplement" to the guideline drafting agency.

XIV. Chapter 20—Appellate Review of Sentences

The first edition was given final approval by the House of Delegates in February 1968. The second edition, represented by this chapter and bearing the same title, was approved in August 1978, with three major policy or substantive changes. First, standard 20-1.1(b) and (d) provided for appeal of sentences by either the prosecutor or the defendant, or both. Furthermore, the power to initiate prosecution appeals was reserved in an officer with statewide responsibility for the administration of criminal justice. Second,

116. *Id.* § 18-7.1.
117. *Id.* § 18-7.3.
118. *Id.* § 18-7.4.
119. *Id.* § 18-7.5.
120. 411 U.S. 778 (1973).
121. 408 U.S. 471 (1972).

standard 20-2.1 modified the position in the first edition by eliminating the provision that the highest court in a three-tiered court system should not review appeals of sentences. Third, standard 20-3.3(b) prohibited a sentencing review court from imposing a harsher sentence than that appealed from when the defendant alone appeals; such increases, permitted by the first edition, were eliminated as a counterbalance to the change in standard 20-1.1 permitting prosecution appeals designed to seek an increase in sentences deemed too lenient. However, on February 4, 1980, the House of Delegates, at the initiation of the Section of Corporation, Banking and Business Law, approved a resolution opposing government appeal of sentences on the ground that they are too lenient;[122] thus, the 1978 approval of the change in standard 20-1.1(b) and (d) was reversed, and the second edition has been revised to reflect that.

In the remaining analysis of this chapter, we will take a closer look at the major changes that had been proposed, and also examine the overall philosophy and thrust of the concept of appellate review of sentences during the decade between editions.

The premise upon which the first edition was based remains as firm as ever for the second edition. The goal of the chapter is to remedy the disparity between the substantial procedural protections afforded defendants in the guilt determination phase of the trial and the traditionally weaker protections available in the sentencing phase.

The standards emphasize that a system of sentence review would provide a means by which grossly excessive sentences can be corrected. Sentence review would also force the important sentencing decisions more into the open, thus exposing errors and at the same time building a needed base for the prevention of future mistakes. More importantly, such a system would help greatly to eliminate many needless technical appeals which, absent a system of sentence review, are all too often a covert attempt to induce reversals to rectify unduly harsh sentences.

Part I enunciates the general principles. It was here that the changes in standard 20-1.1 were addressed. The first edition took no official position on the matter of government appeal of sentences; however, in the commentary, there is indication that both the task force which drafted the standards and the Special Committee which completed the drafts entertained doubts and even some more certain feelings that there might be constitutional problems based on double jeopardy.[123]

The restrictive portion enunciated in standard 20-1.1(d) of the second edition was designed to place the power to authorize a prosecution appeal in someone other than the prosecutor who tries the case; thus it would provide a safeguard against the possibility of a retaliatory cross-appeal by the government on the sentence which might create an undesirable cloud on a defendant's decision whether to seek review of the conviction itself. This restriction was analogous to the Senate version of the proposed Federal

122. Report with Recommendations to ABA House of Delegates, 1980 Midyear Meeting, Report 119; Summary of Action of the ABA House of Delegates, 1980 Midyear Meeting 13.

123. STANDARDS (1st ed. 1968), *supra* note 45, APPELLATE REVIEW OF SENTENCES 3, 56-57.

Criminal Code, then undergoing consideration in the Congress, which would allow the United States to appeal a sentence only if the Attorney General or a designee authorized it in a specific case.[124]

On August 6, 1979, the United States Court of Appeals for the Second Circuit held in the case of *United States v. DiFrancesco*[125] that prosecution appeal of a sentence under the Organized Crime Control Act violated the double jeopardy provisions of the constitution.[126] Notwithstanding the recommendation of the Standing Committee to defer action until the Supreme Court disposed of the *DiFrancesco* case[127] which it had accepted on certiorari,[128] the House of Delegates in February 1980 approved a resolution which "as a matter of principle, opposes government appeal of sentences on the grounds that they are too lenient."[129] Accordingly, paragraphs (b) and (d) of standard 20-1.1 have been revised.

Interestingly, on December 9, 1980, the Supreme Court decided the *DiFrancesco* case, reversing the Second Circuit and holding that government appeal does not violate the double jeopardy clause of the fifth amendment.[130]

In connection with the issue of prosecution appeals, it is appropriate to consider the change in the second edition relating to the powers of the reviewing court. Standard 20-3.3(b) provides that when an appellate court reviews a sentence on appeal by a defendant, the court should not be permitted to impose a sentence more severe than the sentence appealed from. Similarly, if a reviewing court remands such a case for purposes of resentencing, the trial court must not impose a sentence more severe than the sentence originally imposed.

The first edition provided that a power to increase sentences should exist in defendant appeals, the rationale being that it is as appropriate to correct an excessively low sentence as an excessively high one. However, when the second edition was being formulated, and the decision was made to include provision for government appeal, a corollary decision was also made to eliminate the first edition provision on increases when only the defendant appeals. These two changes, however, were not made interdependent; thus, when the ABA reversed the change permitting prosecution appeals, the change in standard 20-3.3(b) remained. Standard 20-3.3(b) would not bar an increase in the sentence if the prosecution had properly taken an appeal on grounds other than leniency, such as, for example, that the sentence is invalid as a matter of law.

The remaining change in chapter 20 which merits consideration occurred in standard 20-2.1, which refers to the reviewing court. It now provides: "Each court that is empowered to review the conviction should also

124. S. 1722, 96th Cong., 1st Sess. (1979).
125. 604 F.2d 769 (2d Cir. 1979), *rev'd*, 449 U.S. 117 (1980).
126. *Id.* at 786.
127. Report with Recommendations to ABA House of Delegates, 1980 Midyear Meeting, Report 111.
128. 444 U.S. 1070 (1980).
129. *Id.*, Report 119.
130. United States v. DiFrancesco, 449 U.S. 117 (1980).

be empowered to review the disposition following conviction. Specialized courts should not be created to review the sentence only." Eliminated from the first edition was the suggestion of precluding appellate review by the highest court in jurisdictions having a three-tiered court system. The reasoning for the change is that a prime objective of appellate review of sentences is to reduce disparity by developing a uniform approach within jurisdictions. As a practical matter, where a jurisdiction has intermediate appellate courts, the likelihood of sentence review being exercised by the highest court would be minimal; still, it was believed beneficial to permit the prerogative to remain.

XV. CHAPTER 21—CRIMINAL APPEALS

The first edition of the standards on Criminal Appeals was approved in August 1970; the second was approved in August 1978. The appeal stage in the criminal process had received little intensive consideration when the first edition *Standards* were formulated. In the eight years between editions, criminal appeals occupied a much greater position in the workload of appellate courts. The revisions in chapter 21 reflect the byproducts of this increased prominence of criminal appeals. Nonetheless, the substantive changes required were comparatively few, and even those did not warrant disturbance of the fundamental norms pioneered in the first edition.

The threshold standard is standard 21-1.1, which affirms unconditionally the right of convicted criminal defendants to one level of appeal; however, as modified in the second edition, standard 21-1.1(b) adds the phrase "[o]rdinarily a decision to take an appeal is made by the defendant" to the single statement of the first edition that "[a]n appeal is not a necessary and integral part of every conviction." There may be some categories of criminal convictions in which appellate review is required by interests of society deemed to transcend choices of the defendants. For example, the apparent trend in death penalty statutes is to include provisions for automatic appeal.[131]

It needs to be emphasized, however, that the concept of elective appeal in the standard presupposes that such an election will be predicated on reasonably arguable, rather than frivolous, grounds. There is general acceptance today that too many appeals are being taken without a reasonable basis. Such problems are addressed in other parts of chapter 21.

Standard 21-1.3, covering limitations on defendants' appeals, final judgments, and interlocutory appeals, contains substantive changes. It recognizes a wider range of issues on which interlocutory appeals may be proper. Use of interlocutory appeals is a difficult matter in any context, but there are special aspects of the problem in criminal cases. In general, the standard adheres to the principle that it is preferable to complete proceedings in the trial court before questions are taken to a higher court. The standard recog-

131. In its decision upholding the constitutionality of recently enacted statutes authorizing imposition of the death penalty, the Supreme Court of the United States emphasized, as one factor, the safeguard of automatic appeal in those acts. Gregg v. Georgia, 428 U.S. 153, 204-06, 222-24 (1976); Proffitt v. Florida, 428 U.S. 242, 258-59 (1976).

nizes three categories of decisions as meriting exceptions to this general principle: 1) where the defendant's rights can be vindicated only through interlocutory appeal, such as to avoid double jeopardy or to have a review of an adverse decision as to bail pending trial; 2) where questions exist concerning the competence of the trial court to hear a pending case; and 3) where trial courts want to certify questions they deem worthy of appellate review before trial. In the view of this standard, none of these exceptions carries the concept of interlocutory appeal as a matter of right; rather, such should be discretionary with the appellate court.

The standard continues to oppose interlocutory appeals in a fourth category of issues commonly decided by pretrial rulings in trial courts. This provision has been made more explicit in the second edition by standard 21-1.3(c) which states as follows:

> Where the only contested issues in a prosecution can be raised and determined by decisions on pretrial motions, such as motions to suppress evidence, motions to exclude confessions, and motions challenging the sufficiency of the charging papers to state an offense, a procedure should be established to permit entry of a final judgment of conviction, on the basis of a guilty plea or a stipulation of the facts necessary for conviction, without foreclosing subsequent appeals on the contested issues.

Standard 21-1.4 pertains to prosecution appeals and contains a valuable modification to reflect clarification by recent Supreme Court cases in the application of the double jeopardy clause. This modification occurs in paragraph 21-1.4(a) to make clear that appeal by the prosecution is proper on certain trial court rulings whether made before trial or after the fact-finding process of the trial is concluded. The timing of the trial court's decision should not control appealability. As long as the procedure does not raise constitutional questions under the double jeopardy clause of the constitution, appeal by the prosecution should be permitted. Several United States Supreme Court opinions subsequent to the first edition have been incorporated in the modifications to subsection (a).[132]

Standard 21-2.3 covers unacceptable inducements and deterrents to taking appeals. Paragraph (b) is new and contains substantive changes. It enumerates the following as examples of unacceptable inducements for defendants to appeal:

> (i) absence of any risk that a financial obligation may be imposed on an appellant who pursues a frivolous appeal;
> (ii) automatic release from custody, on bail or recognizance, following a sentence to a term of confinement; and
> (iii) automatic detention of the appellant who is confined pending appeal in a facility substantially different in quality and regimen from those in which inmates serving sentences are normally held.

New subparagraph (i) was intended to reflect a growing realization that

132. *See, e.g.*, Serfass v. United States, 420 U.S. 377 (1975); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332 (1975).

even indigent defendants may have certain financial resources with which to pay for certain services. Thus, this new provision would authorize an appellate court to assess certain costs against a defendant who, although meeting the technical eligibility for indigency, nevertheless has funds. For example, the defendant may have savings from inmate work that was compensated, and such assessment of costs or a portion may have been justified because of aspects of frivolity in his appeal. Thus, the standard is designed to confront in part at least a "nothing to lose" attitude of some indigents. The formulators of this amendment were acutely conscious that numerous Supreme Court opinions in the past decade have had the effect of substantially removing the obstacles of indigency as a constraint on criminal appeals.[133] In the wake of those decisions, the number of such appeals has risen sharply. Thus, the thrust of subparagraph (i) is to provide a counterincentive which will be consistent with the equal protection constitutional guarantees. A Supreme Court opinion in 1974 lends support to this approach.[134]

Paragraph 21-2.3(c), which enumerates examples of unacceptable deterrents to defendants' appeals, has been modified to reflect subsequent decisions of the United States Supreme Court.[135] Thus, it conforms to constraints on the sanctions on reprosecution which the Court has articulated. Defendants with substantial grounds for appeal from a conviction should not be deterred from appealing because of the possibility that if they succeed they face renewed prosecution that could result in a heavier sentence.

Standard 21-2.5 deals with release pending appeal and stay of execution. Paragraph (d) contains a substantive change designed to limit the scope of its counterpart in the first edition, and now reads as follows: "Dilatory prosecution on an appeal through acts or omissions of appellant or appellant's counsel should be grounds for termination of the release of appellant pending appeal." Even if the release was appropriate when the appeal commenced, the decision is subject to reconsideration on the above grounds, but the change in the paragraph was intended to limit terminations to cases in which fault for delay lies with the defendant or counsel representing the defendant.

XVI. CHAPTER 22—POSTCONVICTION REMEDIES

The first edition of the Postconviction Remedies Standards, approved in 1968, provided procedural guidelines in an area of great and increasing need. As the introduction to that edition observes, postconviction review had become an established part of the criminal process within "the past few years." It was a byproduct, in part, of the changes in criteria governing criminal prosecutions wrought by the Supreme Court of the United States.

133. *See, e.g.*, Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1956); *cf.* Ross v. Moffitt, 417 U.S. 600 (1974) (state need not provide appeal for indigents and if appeal is provided for, state does not necessarily have to provide counsel).

134. Fuller v. Oregon, 417 U.S. 40 (1974).

135. *See, e.g.*, Blacklege v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969).

The standards in the second edition, approved in 1978, are substantially similar to the originals, but they enjoy a considerable body of support from their decade in the marketplace. As we examine chapter 22, we shall see that there have been some noteworthy improvements made, some of substantive dimensions, and some primarily designed to clarify or emphasize principles already in the first edition.

Before examining specific changes, an overview of the scope of this segment of standards might be helpful. First and foremost, these particular standards are intended to be purely procedural, as distinguished from any attempt to articulate either substantive criminal law or related principles of constitutional law. Thus, one should not expect to find in either the first or second editions any effort to define the grounds for postconviction relief.

Another basic concept in the *Standards* is that the procedure should be capable of handling all postconviction claims in a single form. Yet the *Standards* do not recommend that all postconviction litigation be consolidated in a single statewide court, or that an officer of the government with statewide jurisdiction need represent the respondent. The *Standards* aim for the principle of finality, and, to help achieve that, the *Standards* contain guidelines to prevent abuse of process, and to provide for denial of relief when abuse is proved.[136]

Finally, the standards articulate guidelines for preparation of applications for postconviction relief and for resources available to applicants, for standardized application forms, for helping to ensure against false applications, and for guiding courts as to imposition of financial liability on applicants in cases where the applicants are adjudged to have taken undue advantage of postconviction remedies.

Highlights of the changes made in chapter 22 will now be addressed, together with the rationale prompting them.

Standard 22-1.3 pertains to the proper parties to postconviction proceedings, one of whom is referred to as the respondent, defined in standard 22-1.3(a) as "the entity in which name the original prosecution was brought, for example, State, People, Commonwealth, or the United States of America." Paragraph (b) has been modified to permit either a statewide officer or the local prosecutor to appear as counsel for the respondent. The first edition fixed this responsibility in all cases on a statewide official, who might in turn delegate functions to local prosecutors.

Standard 22-1.4, dealing with jurisdiction, venue, and assignment of judges, has been revised in paragraph (a) to permit proceedings for postconviction relief to be vested in any trial court of general criminal jurisdiction, as opposed to the single statewide court called for in the original *Standards*.

Standard 22-2.2 covers prematurity of applications for postconviction relief, and postponed appeals. Subsection (a) has been revised to permit flexibility in the time for processing an appeal from the prosecution phase of a case when an application for postconviction relief is filed before such appeal has been concluded. This change is designed to encourage consolidation of

136. STANDARDS, *supra* note 1, at 22.5.

postconviction claims and claims of error in proceedings leading to conviction.

Standard 22-3.1 pertains to preparation of applications for postconviction relief, as well as to resources available to applicants. The first edition version of this standard accepted as a premise that most potential applicants for postconviction relief would be confined in prison and would be compelled by circumstances to commence proceedings without assistance of counsel and with only limited legal materials. The revision proceeds from the entirely different premise that counsel should be available, either through attorneys practicing as part of in-prison programs or through supervised law students. The fundamental principle of the standard has been broadened to cover the situation of persons not in confinement, although the need for legal services is most acute within custodial institutions.

Despite numerous decisions, the Supreme Court has not established a right to counsel beyond the first level of appellate review of convictions; thus, there is no right to counsel recognized under the fourteenth amendment for inmates, or for persons not in custody, who contemplate postconviction proceedings.[137] Nonetheless, standard 22-3.1 concludes that there should be a system supported by public funds to make professional advice and professional assistance available.

Recommendations for publicly supported legal assistance notwithstanding, the standards provide in 22-4.7(a)(iii) that the applicant bear some risk through the potential of a postjudgment assessment of costs or the like, which would serve to deter a prospective applicant from indiscriminate filing in disregard of professional advice of the type contemplated. The power of the court to assess costs represents a change in the second edition. With the emerging pattern of compensating inmates for work in prisons, even those who otherwise lack financial resources can be held accountable for some part of the postconviction litigation expense. A comparable principle is contained in the chapter on Criminal Appeals.[138]

Standard 22-5.3(a), concerned with processing appeals, adopts the philosophy of the revised chapter on Criminal Appeals[139] that there should be a diversified and flexible processing of appellate cases. The standard encourages appellate courts to consider all pertinent legal issues on their merits insofar as possible, in order to reach a final determination of the entire criminal case.

Standard 22-6.1 deals with finality of the judgment of conviction and sentence. The original standard concerning abuse of process has been modified here to take into account criminal procedure rules that regulate the time for presenting certain defenses or objections in the course of prosecution proceedings. Where an applicant raises in a postconviction proceeding an issue which might have been, but was not, presented in a timely manner in the proceeding leading to judgment of conviction, the burden is placed on the

137. *See* Bounds v. Smith, 430 U.S. 817 (1977); Ross v. Moffitt, 417 U.S. 600 (1974); Younger v. Gilmore, 404 U.S. 15 (1971); Johnson v. Avery, 393 U.S. 483 (1969).

138. STANDARDS, *supra* note 1, § 21-2.3(b)(i).

139. *Id.* §§ 21-3.1-3.4.

applicant to show cause for the failure to comply with the rules of procedure.[140]

The final standard in chapter 22 involves a change which deserves mention because of some intervening case law. Standard 22-6.3 covers renewal of prosecution against a successful postconviction applicant. Paragraph (b) provides: "Credit should be given toward service of the minimum and maximum terms of any new prison sentence for time served under a sentence successfully challenged in a postconviction proceeding."

If the original sentence under the invalidated judgment was for less than the statutory maximum applicable to the renewed prosecution, the question arises whether a more severe sentence can be imposed. The prophylactic rule of *North Carolina v. Pearce*[141] largely controls this question. Thus, the provision in the original standard for a ceiling on sentences has not been carried forward into the second edition.

CONCLUSION

As has been demonstrated, the second edition of the *ABA Standards for Criminal Justice* is marked by both continuity and change. Many of the standards are either unchanged or changed only stylistically. On the other hand, many of the second edition standards reflect major substantive changes. The changes are due, in large part, to the case law between the first and second editions.

Despite what are hoped to be major advances in the *Criminal Justice Standards*, we do not pretend that they are in any sense the last word in criminal justice. Just as the first edition was revised to benefit from advances between the first and second editions, the second edition will, no doubt, eventually be supplanted by a third. The best we can hope for is that, in practice, the implementation of the second edition *Standards* results in the desired improvements, and that our experience with the second edition *Standards* provides a firm base from which to design a better third edition.

140. *Id.* at 22.62-.63.
141. 395 U.S. 711 (1969).

THE PERJURIOUS DEFENDANT: A PROPOSED SOLUTION TO THE DEFENSE LAWYER'S CONFLICTING ETHICAL OBLIGATIONS TO THE COURT AND TO HIS CLIENT

WILLIAM H. ERICKSON*

INTRODUCTION

In a criminal case, defense counsel has a dual function: officer of the court and trained legal advocate for his accused client. The roles conflict when the lawyer learns that his client intends to offer false or otherwise misleading testimony. How does the defense lawyer reconcile his obligations and duties to the court with those he owes to his client? Legal experts have offered various solutions, none of which have been enthusiastically accepted. The purpose of this article is to explore the nuances of, and offer a solution to, the ethical dilemma faced by a defense lawyer who is confronted with a client who intends to commit perjury.[1]

The American adversary system of criminal justice is not inquisitorial, but accusatory.[2] Evidence is presented to the judge or jury by trained advocates according to established rules, so that conflicting factual issues may be resolved and truth emerge as the final product.[3]

Chief Justice Burger, in a now well-known metaphor, has compared the American adversary system to a tripod or three-legged stool.[4] The judge, prosecutor, and defense lawyer form the three legs of the tripod. Each must be equally strong and must fulfill his separate duties if the tripod of justice is to maintain its stability and strength.[5] Adding strength to the tripod are the

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1. A lawyer's belief that his client intends to commit perjury must be based upon his independent investigation of the evidence or his client's statement of a clear intent to commit perjury. Mere inconsistency in the client's story is not sufficient to support the lawyer's belief. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 7.7, commentary at 276 (1st ed. 1971) [hereinafter cited as STANDARDS (1st ed.)].

2. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966); Miranda v. Arizona, 384 U.S. 436 (1966).

3. *See generally* United States v. Havens, 446 U.S. 620 (1980); Harris v. New York, 401 U.S. 222 (1971); Tehan v. Shott, 382 U.S. 406 (1966).

4. Address by Chief Justice Warren E. Burger, Second Plenary Session, American Bar Association Annual Meeting (July 16, 1971). *See generally* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

5. *See* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979); Erickson, *The History of the Tripod of Justice*, 64 MIL. L. REV. 79 (1974).

American Bar Association (ABA) Standards for Criminal Justice which relate to the functions of the trial judge, the prosecution (Prosecution Standards), and the defense (Defense Standards),[6] and the ABA Code of Professional Responsibility (Code of Professional Responsibility).[7]

In our legal system there are many deterrents to the introduction of false or improper evidence at trial. First, the ABA Prosecution Standards and the Code of Professional Responsibility emphasize that the prosecutor's function is to seek justice, not merely to convict.[8] Well-established precedent forecloses the prosecutor from using false or perjured testimony in the pursuit of a conviction.[9] Second, evidentiary and exclusionary rules screen out unreliable evidence and prevent overzealous law enforcement.[10] Finally, the Defense Standards classify intentional misrepresentation of fact or law to the court as unprofessional conduct.[11] The defense lawyer who knowingly uses false evidence deflects the truth finding process as much, if not more, than the overzealous police officer or prosecutor. The misconception that the defense lawyer is the alter ego and mouthpiece of the accused, speaking with the erudition of a lawyer but espousing only the views of his client, has been put to rest.[12]

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6. ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (2d ed. 1980) [hereinafter cited as PROSECUTION STANDARDS OR DEFENSE STANDARDS].

7. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as ABA CODE].

8. PROSECUTION STANDARDS, *supra* note 6, § 3-1.1(C); ABA CODE, *supra* note 7, DR 7-103(B). *See also* People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973); People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1973).

9. The United States Supreme Court has strongly condemned the prosecution for offering false evidence and has set aside convictions obtained by the use of evidence known to be false:

> More than 30 years ago this Court held the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Mooney v. Holohan, 294 U.S. 103. There has been no deviation from that established principle. Napue v. Illinois, 360 U.S. 264; Pyle v. Kansas, 317 U.S. 213; *cf.* Alcorta v. Texas, 355 U.S. 28. There can be no retreat from that principle here.

Miller v. Pate, 386 U.S. 1, 7 (1967).

10. *See* United States v. Calandra, 414 U.S. 338 (1974); *see also* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

11. DEFENSE STANDARDS, *supra* note 6, § 4-7.5. When an accused client or attorney presents false documentary evidence or affidavits to the trier of fact, the courts are in general agreement in barring such evidence. *See, e.g.*, Utz v. State Bar, 21 Cal. 2d 100, 130 P.2d 377 (1942); *In re* Trimble, 226 Ind. 187, 79 N.E.2d 213 (1948); *In re* Ellis, 155 Kan. 894, 130 P.2d 564 (1942); *In re* Kenner, 178 La. 774, 152 So. 520 (1931); State v. Fisher, 103 Neb. 736, 174 N.W. 320 (1919). In addition, the signature of a lawyer on a pleading submitted to the court constitutes certification that, to the best of his information, knowledge, and belief, it is truthful. *See, e.g.*, COLO. R. CIV. P. 11. The criminal defense lawyer's duty not to use false testimony of persons other than the defendant is also well-established. *See, e.g.*, People v. Schultheis, No. 80-SC-299 (Colo. Oct. 19, 1981); Herbert v. United States, 340 A.2d 802, 804 (D.C. 1975); People v. Pike, 58 Cal. 2d 70, 96, 372 P.2d 656, 672, 22 Cal. Rptr. 664, 680 (1962). *See also* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 32 (1975).

12. DEFENSE STANDARDS, *supra* note 6, § 4-1.1, commentary at 4.9. Chief Justice Burger advocates this principle:

> The popular misconceptions about the functions of lawyers in criminal cases flow from many sources including misconduct of some lawyers themselves . . . and a misplaced sentimentality which has put some lawyers in doubt as to their function.
>
> One result of these fallacious and blurred conceptions of the advocate's function is the public image of the criminal lawyer as the servile 'mouthpiece' or the alter ego of the accused or one who does for the accused what the accused would do for himself if he had the legal skills . . . [This] is totally incompatible with the basic duty of a

The Defense Standards describe the role of the modern defense attorney as the accused's professional representative—counselor and advocate—but not alter ego.[13] The *Standards* stress establishment of a close lawyer-client relationship through private, confidential communications.[14] The *Standards* also specify that it is unprofessional conduct for the lawyer who is interviewing a client to encourage less than candid responses.[15] The attorney should probe for all legally relevant information without seeking to influence the response.[16]

The tension between the defense lawyer's role as an officer of the court and his duty to act as a zealous advocate and representative of his accused client creates the lawyer's dilemma. Any solution to this dilemma which fails to protect the integrity of the truth-finding function of the adversary system of justice is inadequate. This article will examine the different approaches to the ethical dilemma which confronts defense counsel when the client intends to commit perjury, and will propose a practical, ethically acceptable solution.

I. THE ETHICAL DILEMMA

A conflict between defense counsel's ethical obligations to the court and those to his client surfaces when the accused client insists upon testifying in his own defense and makes known his intent to commit perjury. The Defense Standards recognize that a defendant has certain rights—to decide the plea which should be entered, whether trial will be to a jury or to the court, and whether to testify in his own defense.[17] As a result, defense counsel can strongly advise the client not to testify, but cannot prevent the client from testifying and committing perjury.

On the other hand, after consulting with the client, defense counsel is the "captain of the ship" and thus the final arbiter for general trial tactics,

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lawyer as an officer of the court and contrary to the traditions and ethics of the legal profession.

A lawyer . . . advocates but does not identify with his client. The alter ego or mouthpiece school of thought, which is happily a minute fraction of the legal profession, would carry this perverted notion to the point of complete identification of lawyer with client, *i.e.*, the lawyer as an extension of the accused himself with a community of interest, motivation, and goals, bound to engage in falsehood and chicane at the command of the client. These concepts have long been rejected . . . and find no acceptance among honorable members of the bar.

The lawyer . . . should be . . . a professional advocate with a highly important but nonetheless limited function, *i.e.*, limited and circumscribed by the rules of the system and the ethics of the profession. At the trial stage his duty is to put the prosecution to its proof, to test the case against the accused, to insist that the procedural safeguards be followed and to put forward evidence which is valid, relevant and helpful to his client. On appeal his function is to point to trial errors, if such there be, and expound the applicable rules of law. In short, he is to 'put his client's best foot forward.' . . . Johnson v. United States, 360 F.2d 844, 846-47 (D.C. Cir. 1966) (Burger, J., concurring) (footnotes omitted).

13. DEFENSE STANDARDS, *supra* note 6, § 4-1.1.

14. *Id.* § 4-3.1.

15. *Id.* § 4-3.2.

16. *Id.*

17. *Id.* § 4-5.2(a). The United States Supreme Court has not specifically recognized a defendant's constitutional right to testify in his own behalf. *See* Robinson, *The Perjury Dilemma in an Adversary System*, 82 DICK. L. REV. 545, 554-61 (1978).

strategy, and witness selection.[18] If the attorney and client disagree on significant matters of trial tactics, the *Standards* direct the attorney to make a confidential record of the circumstances, his advice and reasons, and the conclusion reached.[19]

The perjury issue assumes ethical dimensions when defense counsel knows that his client intends to offer false testimony. The lawyer's dilemma arises from his duty as an officer of the court not to offer false testimony and his concomitant duty to his client to preserve confidential communications and to discover all relevant facts known to the accused in order to prepare an effective defense.[20] The first component of the dilemma is created by counsel's obligation to determine "all relevant facts known to the accused."[21] It is axiomatic that counsel is unable to prepare a good case if ignorant of essential facts; thus, the foundation for the requirement that defense counsel investigate and obtain all relevant facts is rooted in the sixth amendment's guarantee of effective assistance of counsel.[22] The lawyer's obligation to provide the client with an effective defense depends on the client's willingness to disclose all relevant facts, no matter how prejudicial or embarrassing. Accordingly, protecting client confidences is one of the attorney's most sacred obligations[23] and is "so essential to effective representation and to the proper functioning of the legal system that the obligation is protected by the attorney-client privilege."[24]

The second component of the dilemma is created by the lawyer's oath, which is uniformly required for admission to the bar. In Colorado, the prospective lawyer pledges: "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law. . . ."[25] Thereafter the lawyer is an officer of the court whose official conduct "should be characterized by candor."[26] Moreover, in most states, every lawyer is bound by the professional stan-

18. DEFENSE STANDARDS, *supra* note 6, § 4-5.2.

19. *Id.*

20. Professor Monroe H. Freedman has described the lawyer's position as a "trilemma." *See* M. FREEDMAN, *supra* note 11, at 27-42. Substantially the same material from Professor Freedman's book is reprinted in Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26 (1975).

21. M. FREEDMAN, *supra* note 11, at 27, (quoting STANDARDS (1st ed.), *supra* note 1, STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.2(a)).

22. U.S. CONST. amend. VI provides: "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The United States Supreme Court has interpreted this provision in several landmark cases. *See, e.g.*, Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). In some jurisdictions, the right to counsel has been interpreted to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. *See, e.g.*, State v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).

23. ABA CODE, *supra* note 7, Canon 4.

24. Robinson, *supra* note 17, at 548. *See also*, ABA CODE, *supra* note 7, EC 4-1.

25. COLO. R. CIV. P. 220.

26. M. FREEDMAN, *supra* note 11, at 27 (quoting ABA CANONS OF PROFESSIONAL ETHICS No. 22). *See also* ABA CODE, *supra* note 7, EC 9-6; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 287 (1953).

dards contained in the Code of Professional Responsibility,[27] which also forecloses the use of perjured testimony and protects a client's privileged communications to his lawyer.[28]

Therefore, defense counsel faces seriously conflicting obligations when he becomes aware that a client intends to commit perjury. Which obligation is paramount: The duty of candor to the court or the duty to preserve inviolate client confidences? If the defense attorney reveals to the court the client's intent to commit perjury, conviction and enhanced punishment are likely. On the other hand, if the defendant's intent is not revealed, the attorney participates in deceiving the court and the jury.

II. ETHICAL GUIDELINES FOR THE DEFENSE LAWYER

A. *ABA Code of Professional Responsibility*

The American Bar Association adopted the Code of Professional Responsibility in 1969, effective January 1, 1970.[29] Recognizing that the former Canons of Professional Ethics[30] were "generalizations designed for an earlier era,"[31] the Code of Professional Responsibility sought to provide "clear, peremptory rules in the critical areas relating most directly to the duty of lawyers to their clients and to the courts."[32] The Code's mixture of Canons, Disciplinary Rules, and Ethical Considerations,[33] however, often fails to prescribe a precise course of conduct for criminal lawyers.

Disciplinary Rule 7-102(A)(4) dictates that a lawyer shall not "knowingly use perjured testimony or false evidence."[34] While this provision, at

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27. Colorado has adopted the Code as the standard of professional conduct for lawyers licensed to practice in Colorado. COLO. R. CIV. P. 223.

28. *See* ABA CODE, *supra* note 7, DR 7-102(A)(4), DR 7-102(B)(1), DR 4-101.

29. ABA CODE, *supra* note 7, at Preface. The Code replaced the Canons of Professional Ethics adopted by the ABA in 1908. These Canons were originally derived from the first organized code of professional ethics, which was adopted in 1887 by the Alabama State Bar Association. The Alabama code, in turn, was based on a series of lectures by Judge George Sharswood at the University of Pennsylvania Law School in 1854. Sharswood's lectures emphasized an attorney's differing roles to the client, the public, the state, and to his "professional brethren." *See* Armstrong, *A Century of Legal Ethics*, 64 A.B.A.J. 1063 (1978).

30. ABA CANONS OF PROFESSIONAL ETHICS, as amended (1908).

31. ABA CODE, *supra* note 7, at Preface.

32. Armstrong, *supra* note 29, at 1069 (quoting from the 1965 annual address to the American Bar Association by former ABA President Lewis Powell).

33. The provisions of the Code are divided into Canons, Disciplinary Rules, and Ethical Considerations, each of which is described in the Code as follows:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of profesional conduct expected of lawyers in relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.
>
> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.

ABA CODE, *supra* note 7, at Preliminary Statement.

34. *Id.* DR 7-102(A)(4). Various court decisions have held that a rule of this type overrides

first glance, may seem to be unambiguous, the related Disciplinary Rules and Ethical Considerations do not indicate how defense counsel should comply with the rule if his client insists upon taking the witness stand and testifying falsely.[35] In fact, Ethical Consideration 7-26 complicates this ambiguity by expanding a lawyer's obligation not to use perjured testimony or evidence in situations where he "knows, *or from facts within his knowledge, should know*, that such testimony or evidence is false, fraudulent, or perjured."[36]

Other provisions of the Code provide no clarification. Disciplinary Rule 4-101 states the general rule prohibiting a lawyer from revealing the confidences and secrets of his client.[37] Subsection C of DR4-101, however, makes an important qualification: "A lawyer may reveal . . . the intention of his client to commit a crime and the information necessary to prevent the crime."[38]

Does perjury committed during the course of a client's testimony constitute a crime within the meaning of DR 4-101(C)? The plain meaning of the rule would indicate that perjury, since it is a crime, would fall within the exception. Professor Freedman, however, has argued to the contrary.[39] He bases his position on the extreme prejudice that can result from informing a judge of the defendant's intention to lie under oath, since that judge may later hear the case and sentence the defendant.[40] In addition, statutory enactments in some jurisdictions preclude prosecution for perjury when the defendant's false statement was a denial of his guilt at trial.[41] Regardless of whether perjury is a crime to which the rule applies, it is important to note that the exception is discretionary. It provides only that a lawyer *may* reveal the intentions of his clients to commit a crime; it does not dictate revelation.[42]

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a defendant's right to the effective assistance of counsel. *See, e.g.*, People v. Schultheis, 618 P.2d 701 (Colo. App. 1980), *rev'd*, No. 80-SC-299 (Colo. Oct. 19, 1981); *see also In re* Branch, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969); People v. Pike, 58 Cal. 2d 70, 372 P.2d 656, 22 Cal. Rptr. 664 (1962); People v. Lewis, 75 Ill. App. 2d 560, 393 N.E.2d 1380 (1979); State v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).

35. M. FREEDMAN, *supra* note 11, at 29. *See also* Lawry, *Lying, Confidentiality and the Adversary System of Justice*, 1977 UTAH L. REV. 653; Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977).

36. ABA CODE, *supra* note 7, EC 7-26 (emphasis added.)

37. *Id.* DR 4-101(A), (B). The rule provides:

> Preservation of Confidences and Secrets of a Client
>
> (A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

See generally Morrell v. State, 575 P.2d 1200 (Alaska 1978); *In re* January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976).

38. *Id.* DR 4-101(C). *See generally* State v. Hodge and Zweig, 548 F.2d 1347 (9th Cir. 1977).

39. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

40. *Id.* at 1476-78.

41. *See, e.g.*, COLO. REV. STAT. § 18-8-507 (1973).

42. *But see* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 314 (1965) (interpreting ABA CANONS OF PROFESSIONAL ETHICS, (1908)), which indicates that a lawyer *must* dis-

Similarly, the rule relating to frauds upon the court fails to provide adequate guidance to a lawyer who discovers that his client has committed perjury:

> A lawyer who receives information clearly establishing that: [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.[43]

The straightforward requirement that attorneys report client frauds upon the court,[44] however, is also muddled by a qualification. Under DR 7-102(B)(1), if defense counsel learns of his client's fraud through "a privileged communication," he need not inform the court.[45] The Code, however, fails to provide any clear definition of which communications are so privileged.[46] Moreover, DR 4-101(C)(2) allows a lawyer to reveal confidences or secrets whenever "permitted" under the Disciplinary Rules.[47] It is uncertain, however, which confidences and secrets falls within the "privileged communication" clause in DR 7-102(B)(1), so as to permit their disclosure.[48]

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close even the confidences of his clients if "the facts in the attorney's possession indicate beyond a reasonable doubt that a crime will be committed."

43. ABA CODE, *supra* note 7, DR 7-102(B)(1). *Cf.* AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT rule 11(d) (1971): "Subject to whatever qualifications may exist from the confidential privilege that exists between a lawyer and his client, the lawyer should expose without fear before the proper tribunals perjury, subornation of perjury and any professional misconduct."

44. The use of perjured testimony or false evidence is generally regarded as a fraud upon the court for the purposes of DR 7-102(B)(1). *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT rule 3.3 at 128 (Proposed Final Draft May 30, 1981) [hereinafter cited as ABA MODEL RULES].

45. ABA CODE, *supra* note 7, DR 7-102(B)(1). As originally adopted, the rule did not contain any exception; it was added in the 1974 amendments to the Code. Hence, it may be argued that the purpose of the original wording of the provision was to make disclosure mandatory in all situations. *See* M. FREEDMAN, *supra* note 11, at 20; A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 147 (1976). Further, the ABA STANDARDS, referring to the original draft of DR 7-102(B)(1), state that the provision "is construed as not embracing the giving of false testimony in a criminal case." STANDARDS (1st ed.), *supra* note 1, STANDARDS RELATING TO THE DEFENSE FUNCTION, Supplement at 18. Therefore, even before the amendment the clause did not apply to the criminal defense lawyer. *See* M. FREEDMAN, *supra* note 11, at 29. One ABA Opinion states that

> [t]he tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information (whether a confidence or a secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).

ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 341 (1975).

46. A. KAUFMAN, *supra* note 45, at 147.

47. ABA CODE, *supra* note 7, DR 4-101(C)(2).

48. A. KAUFMAN, *supra* note 45, at 147. "Confidences and secrets" are defined in ABA CODE, *supra* note 7, DR 4-101(A). *See also* note 37 *supra*. The ABA Committee on Ethics and Professional Responsibility has attempted to resolve this uncertainty through circular reasoning: "The balancing of the lawyer's duty to preserve confidences and to reveal frauds is best made by interpreting the phrase 'privileged communications' . . . as referring to those confidences . . . that are required to be preserved by DR 4-101." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 341 (1975).

B. *The Defense Standards Proposal*

Proposed section 4-7.7 of the Defense Standards[49] provides another answer to the ethical dilemma. When a lawyer discovers that his client intends to commit perjury, he must strongly advise his client not to offer the false or misleading testimony. If the defendant insists on taking the stand and testifying falsely, defense counsel must seek to withdraw from the case. The motion to withdraw should not specify the basis for withdrawal and the intended perjury should not be revealed to the court. If withdrawal is not feasible because trial is imminent or has commenced, or if the motion to withdraw is denied, defense counsel should limit direct examination of the defendant to those areas where counsel believes that the defendant's answers will not be perjurious. The lawyer should avoid direct examination on matters which defense counsel believes the defendant will offer perjurious testimony. He should merely ask the defendant if he wishes to make any additional statement concerning the case to the judge or jury. Defense counsel should then make a record, out of the presence of the jury, of the fact that his client is taking the stand against his advice.[50]

In an attempt to accommodate conflicting ethical duties, the Defense Standard properly stresses the lawyer's duty not to present known false testimony.[51] Nonetheless, the proposal presents significant difficulties.[52] The constitutional and practical deficiences of implementing section 4-7.7 have come to light in recent efforts to prepare a new code of ethical conduct.[53]

The defendant could assert the denial of the effective assistance of counsel[54] because the lawyer is prohibited from developing the perjured testimony on direct examination, or advocating acceptance of the testimony in closing argument. Similarly, the fact that a lawyer is subject to disciplinary sanctions for presenting false testimony forces the lawyer to take a position adverse to his client.[55]

In addition, section 4-7.7 presents several practical problems. First, if the trial is about to commence or has already begun, the court will in all likelihood deny the motion to withdraw.

Second, since the defense lawyer is prohibited from disclosing his reasons for withdrawal, denial of the motion is inevitable. Inquiry by the court

49. The 1980 version of the STANDARDS FOR CRIMINAL JUSTICE only contains a proposed standard relating to the perjurious defendant. The ABA House of Delegates has deferred adoption of proposed section 4-7.7 until the ABA Special Commission on Evaluation of Professional Standards reports its final recommendations. DEFENSE STANDARDS, *supra* note 6, § 4-7.7, editorial note at 4.95. The proposed standard, however, is substantially similar to the 1971 version. The most significant change is that the 1980 version adds a provision which states that "it is unprofessional conduct for the lawyer to lend aid to [the defendant's] perjury or use the perjured testimony." DEFENSE STANDARDS, *supra* note 6, § 4-7.7(c).

50. DEFENSE STANDARDS, *supra* note 6, § 4-7.7.

51. ABA CODE, *supra* note 7, DR 7-102(A)(4).

52. *See* Lefstein, *The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma*, 6 HOFSTRA L. REV. 665 (1978); Robinson, *supra* note 17.

53. *See* ABA MODEL RULES, *supra* note 44; AMERICAN LAWYERS CODE OF CONDUCT (Discussion Draft June 1980).

54. U.S. CONST. amend. VI.

55. Lowrey v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (Hufstettler, J., specially concurring); State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976).

into the lawyer's motives for withdrawal forces the lawyer either to disregard his confidential relationship with his client or to stand mute. In either event, the court will conclude that the defendant intends to commit perjury and therefore, will consider the defendant's conduct an obstruction of justice. Upon conviction, an enhanced sentence can be anticipated.

Third, section 4-7.7 does not state what the defense lawyer should do if the prosecutor objects to defense counsel's narrative question.[56] Moreover, the prosecution is permitted to emphasize the defense lawyer's failure to develop the client's testimony. As a result, the focus of the trial shifts from a determination of the defendant's guilt or innocence of the crime charged, to an inquiry into the defendant's perjury.

Finally, if the lawyer is permitted to withdraw, the defendant may use the same tactic with new counsel to obtain unlimited continuances. The delays which could result from such a procedure are intolerable. After having been "educated" by his former lawyer's refusal to present perjured testimony, the defendant may begin his relationship with new counsel with a false statement of the facts. If this "truthful" testimony is all that is known, the new counsel is not involved in presenting known false evidence to the court. The ends of justice, however, are subverted because the defendant is still presenting false testimony.

A brief analysis of *Lowrey v. Cardwell*[57] highlights the deficiencies of section 4-7.7. The defendant in *Lowrey* was charged with first-degree murder. During a trial to the court, the defendant took the stand and offered what defense counsel believed to be perjured testimony. Counsel then requested a recess and, without stating his reasons, moved to withdraw. The motion was denied. Thereafter, counsel did not develop his client's testimony and did not rely on the testimony in closing argument. The trial judge found the defendant guilty of second-degree murder.

In reversing the defendant's conviction and remanding for a new trial, the court of appeals concluded that the defendant was denied a fair trial because defense counsel's action amounted to an unequivocal announcement to the judge that his client was testifying falsely. In a special concurrence, Judge Hufstettler stated that the defendant was denied the effective assistance of counsel:

> [W]hen defense counsel moved to withdraw, he ceased to be an active advocate of his client's interests. Despite counsel's ethical concerns, his actions were so adverse to [the defendant's] interests as to deprive her of effective assistance of counsel. No matter how commendable may have been counsel's motives, his interest in saving himself from potential violation of the canons was adverse to his client, and the end product was his abandonment of a diligent defense.[58]

The Defense Standards approach constitutes an effort to limit the effect

56. *See* M. FREEDMAN, *supra* note 11, at 37.

57. 575 F.2d 727 (9th Cir. 1978).

58. *Id.* at 732 (Hufstettler, J., specially concurring).

of perjured testimony. The flaws in section 4-7.7, however, compromise the integrity of the truth-finding process.

C. *The Proposed Model Rules of Professional Conduct*

The ABA Special Commission on Evaluation of Professional Standards is presently drafting a new set of ethical rules—the Model Rules of Professional Conduct (Model Rules).[59] The Commission, commonly known as the Kutak Commission,[60] was created in 1977 after the ABA Board of Governors accepted the recommendation of the late President William B. Spann, Jr., to "thoroughly and systematically rethink not only the Code of Professional Responsibility, but also the entire range of issues in ethical lawyering."[61] The fourth draft of the Model Rules is now being considered;[62] its approach differs markedly from that of former codes. Various social, economic, and technological changes in the legal system during the past decade, which are reflected in such areas as lawyer advertising and specialization, have caused the Commission to recognize the need for more definitive rules. To reach that end, the Commission has taken "the underlying structural thrust of the Code of Professional Responsibility—its bifurcation of disciplinary rules and ethical considerations—to its next logical step by drafting rules that are the foundation of good professional conduct. . . ."[63]

In approaching the lawyer's dilemma, the Model Rules identify the need for the attorney, as an advocate, to insure candor to the tribunal.[64] Although the Model Rules recognize that a criminal accused has a right to the assistance of an advocate, a right to testify in his own defense, and a right of confidential communication with counsel,[65] the Kutak Commission maintains that an accused should not have a right to assistance of counsel in committing perjury.[66] In the Commission's view, the law imposes obligations and restraints on lawyers which may conflict with the client's ultimate objectives.[67] Therefore, the Commission asserts that an advocate has an ethical and legal obligation to avoid implicating himself in the commission of

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59. ABA MODEL RULES, *supra* note 44.

60. Robert J. Kutak of the national firm of Kutak, Rock and Huie is chairman of the ABA Commission. Professor Geoffrey C. Hazard, Jr. of Yale Law School is the reporter.

61. Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A.J. 47 (1980).

62. This draft has not been approved by the ABA and does not presently constitute ABA policy.

63. Kutak, *supra* note 61, at 47.

64. ABA MODEL RULES, *supra* note 44, rule 3.3 at 124. The Model Rules recognize that the lawyer is an officer of the court and must always conduct himself in accordance with the law. "Given this duty, never, under any circumstances, may a lawyer knowingly proffer perjured testimony and thereby participate in a fraud against the court." Burger, *Standards of Conduct for Prosecution and Defense Personnel*, 5 AM. CRIM. L.Q. 11, 12 (1966). *See also* Frankel, *The Search for Truth*, 123 U. PA. L. REV. 1031 (1975).

65. ABA MODEL RULES, *supra* note 44, rule 3.3 at 126.

66. *Id.*

67. *Id.* at 129.

> Although a lawyer's paramount duty is to vigorously pursue the client's interests, "that duty must be met in conjunction with, rather than in opposition to, other professional obligations." Thorton v. United States, 357 A.2d 429 (D.C. App. 1976). "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The [lawyer] cannot serve two mas-

perjury or other falsification of evidence.[68] Such an obligation overrides the lawyer's duty to keep the client's revelations confidential.

Rule 3.3(a)(4) of the Model Rules provides that "a lawyer shall not knowingly . . . offer evidence that the lawyers knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."[69]

When a criminal defendant seeks to offer testimony that the lawyer knows to be false, the proposed rules provide that the attorney should attempt to dissuade the client from giving perjurious testimony.[70] If this confrontation occurs before trial and the dissuasion fails, the lawyer should seek to withdraw from the case.[71] The Commission recognizes, however, that withdrawal may not always be possible, "because trial is imminent or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available."[72] If the court does not permit withdrawal, the Model Rules require a lawyer to disclose his client's perjury to the court. "It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing."[73]

If the client controverts the lawyer's version of their communication after the lawyer's disclosure, and the issue of whether the client has committed perjury arises, the Commission recognizes that a mistrial may be unavoidable since the lawyer cannot represent the client in the resolution of the perjury issue.[74] If a client attempts to produce several mistrials in the same manner, the Model Rules provide that such actions are "a deliberate abuse of the right to counsel and as such a waiver of the right to further representation."[75]

Although the Model Rules envision that an advocate must disclose perjury in all instances when it occurs, Rule 3.3(a) provides that the obligation

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ters and the one [he has] undertaken to serve primarily is the court." *In re* Integration of the Nebraska Bar Ass'n, 133 Neb. 283, 275 N.W. 265, 268 (1937).

Id.

68. *Id.* at 126.

69. *Id.* at 124. Commentary to rule 3.3 compares this rule to the Code of Professional Responsibility:

> [T]he first sentence of this subparagraph is similar to DR 7-102(A)(4), which provides that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of Rule 3.3(a)(4) resolves an ambiguity in the Code concerning the action required of a lawyer when he discovers that he has offered perjured testimony or false evidence.

Id. at 128.

70. *Id.* at 126.

71. *Id.*

72. *Id.*

73. *Id.* at 127. The Model Rules recognize that a practical time limit on the obligation to rectify the presentation of false evidence is required. *Id.* "The conclusion of the proceeding is a reasonably definite point for the termination of the obligation." *Id.* Further, rule 1.6(b)(3) provides: "A lawyer may reveal [information relating to representation of a client] to the extent the lawyer believes necessary: . . . to rectify the consequences of a a client's criminal or fraudulent act in the commission of which the lawyer's services had been used. . . ." *Id.*, rule 1.6(b)(3), at 37. Rule 1.6(b)(3) modifies DR 7-102(B)(1) by making the disclosure of a fraud committed in the course of representation optional rather than mandatory.

74. *Id.* at 127.

75. *Id.*

is subordinate to constitutional requirements.[76] The qualification addresses the situation in some jurisdictions in which the right to counsel in criminal cases is construed to include a right that counsel not disclose perjury by the accused.[77] Further, the duty to disclose perjury under Model Rule 3.3(a) arises only when a lawyer "knows" that the offered evidence is false. The rule permits, but does not require, an attorney to refuse to offer evidence that he "reasonably believes is false."[78] This rule would presumably give the lawyer more discretion to refuse to offer testimony than the Code of Professional Responsibility presently allows.[79]

D. *The American Lawyer's Code of Conduct*

In 1979, at the request of the Association of Trial Lawyers of America (A.T.L.A.), a commission of the Roscoe Pound-American Trial Lawyers Foundation was formed to prepare a new code of conduct for lawyers.[80] Professor Freedman serves as the reporter for the project, and released the first discussion draft of the American Lawyer's Code of Conduct (Code of Conduct) for public comment in June of 1980.[81]

The general philosophy of the Code of Conduct is that the lawyer's primary duty is to the client; it rejects any proposal to weaken the protection of an accused client's rights, including the proposition that a lawyer should reveal a client's secrets "except in the most extreme circumstances."[82] The philosophy set forth in the Code of Conduct is an extension of Professor Freedman's assertion that the "lawyer must hold in strictest confidence the disclosures made by the client in the course of the professional relationship."[83] He concludes that, between confidentiality to the client and candor to the court, the former is significantly more important.[84] In his view, the lawyer has a duty to attempt to dissuade a client from committing perjury,[85] but if the defendant insists upon taking the witness stand to testify falsely, "the obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury."[86] Consequently, the lawyer should

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76. *Id.*

77. *Id.* at 127. *See, e.g.*, Ohio v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).

78. *See* ABA MODEL RULES, *supra* note 44, rule 3.3(c) at 124.

79. *Id.* at 128. *See* ABA CODE, *supra* note 7, DR 7-102(A)(4), which prohibits the lawyer from offering evidence the lawyer "knows" is false. A number of court decisions, however, support the approach of the Model Rules in this regard. *See In re* Branch, 70 Cal. 2d 200, 449 P.2d 174, 74 Cal. Rptr. 238 (1969); *In re* Atchley, 48 Cal. 2d 408, 310 P.2d 15 (1957); Thornton v. United States, 357 A.2d 429 (D.C. App.), *cert. denied*, 429 U.S. 1024 (1976); Illinois v. Brown, 54 Ill. 2d 21, 294 N.E.2d 285 (1973). The belief required by rule 3.3(c) is a "reasonable" one. See Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977) for the proposition that an unsubstantiated suspicion is insufficient. *See also* Johns v. Smyth, 176 F. Supp. 949 (E.D. Va. 1959).

80. AMERICAN LAWYER'S CODE OF CONDUCT ii (Discussion Draft June 1980) [hereinafter cited as CODE OF CONDUCT].

81. *Id.*

82. *Id.* at v.

83. M. FREEDMAN, *supra* note 11, at 27.

84. *Id.*

85. Freedman, *supra* note 39, at 1478.

86. *Id.* at 1477-78. Professor Freedman was subjected to personal attack after he presented

place the client on the stand, elicit testimony on direct examination, and then argue the testimony to the jury as skillfully as he possibly can.[87] In Professor Freedman's opinion, any contrary position would be inconsistent with "the maintenance of the adversary system, the presumption of innocence, the prosecutor's burden to prove guilt beyond a reasonable doubt, . . . and the obligation of confidentiality. . . ."[88]

Two alternative sets of rules regarding the lawyer-client confidential relationship are provided in the Code of Conduct.[89] Both are more protective of confidentiality than either the present Code of Professional Responsibility or the proposed ABA Model Rules of Professional Conduct. Section 1.2 of Alternative A provides:

> Without the client's knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client's confidence, or use it in any way detrimental to the interests of the client, except as provided in Rules 1.3 to 1.6, and Rule 6.5. (Rules 1.3 to 1.6 permit divulgence under compulsion of law; to prevent imminent danger to life; to avoid proceeding before a corrupted judge or juror; and to defend the lawyer or the lawyer's associates from formally instituted charges of misconduct. Rule 6.5 permits withdrawal in non-criminal cases when the client has induced the lawyer to act through material misrepresentation, even though withdrawal might indirectly divulge a confidence.).[90]

Alternative A prohibits using a client's confidence in a way detrimental to the interests of the client. In all instances in the Code of Conduct, the interests of the client are determined by the client after having been counseled by the lawyer.[91] Further, Alternative A permits, but does not require, divulgence of a client's confidences in certain situations, but rejects the previously recognized exception which permits lawyers to violate confidentiality to collect an unpaid fee.[92] In addition, if there has been inadequate opportunity for consultation with the client, the Code of Conduct provides that "the lawyer should act in accordance with the lawyer's reasonable understanding of what the client would perceive to be in the client's interest."[93]

Alternative B is even more protective of confidentiality between lawyer and client:

> Without the client's knowing and voluntary consent, a lawyer shall not directly or indirectly reveal a client's confidence, or use it in any way detrimental to the interests of the client, as the client per-

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the substance of this position in a paper to the Criminal Trial Institute of the District of Columbia. Several judges complained to the Committee on Admissions and Grievances of the District Court of the District of Columbia, urging that disciplinary action be taken against him. After four months of proceedings, the committee announced its decision to "proceed no further in the matter." Robinson, *supra* note 17, at 552 n.52.

87. *See* Robinson, *supra* note 17, at 552. *See also* M. FREEDMAN, *supra* note 11, at 31.

88. Freedman, *supra* note 39, at 1482.

89. CODE OF CONDUCT, *supra* note 80, § 1.2.

90. *Id.*

91. *Id.* at 106. *See also id.* §§ 2.1, 3.1, 3.2, and Preamble at 4.

92. *Id.* at 106. The Code of Conduct claims that the reason for such an exception—the lawyer's financial interest—"is not sufficiently weighty to justify impairing confidentiality." *Id.* *See also* ABA CODE, *supra* note 7, at DR 4-101(C)(4).

93. CODE OF CONDUCT, *supra* note 80, at 103.

> ceives them, or as the lawyer reasonably understands the client to perceive them if there is inadequate opportunity for consultation.[94]

Neither alternative permits divulging a client's confidence in cases of future or continuing crimes.[95] In fact, under the Code of Conduct, a disciplinary violation is committed if an attorney refrains from presenting a client's false testimony in the ordinary manner, or refrains from using that testimony in summation to the jury.[96]

A major objection to the Code of Conduct is that the obligation of confidentiality should not apply to a client's statement that he intends to commit perjury. The attorney-client privilege has not historically extended to the client who seeks legal assistance in the commission of a future crime.[97] Further, the position espoused by Professor Freedman is a "significant extension and corruption of the defense attorney's role,"[98] since it encourages an attorney to actively assist in presenting known perjured testimony. This role had been summarily rejected in the first edition of the Defense Standards:

> It has even been suggested, but universally rejected by the legal profession, that a lawyer may be excused for acquiescing in the use of known perjured testimony on the transparently spurious thesis that the principle of confidentiality requires this. While no honorable lawyer would accept this notion and every experienced advocate can see its basic fallacy as a matter of tactics apart from morality and law, the mere advocacy of such fraud demeans the profession and tends to drag it to the level of gangsters and their 'mouthpiece' lawyers in the public eye. That this concept is universally repudiated by ethical lawyers does not fully repair the gross disservice done by the few unscrupulous enough to practice it.[99]

In this regard, the approach to the client-perjury issue recommended by the American Lawyer's Code of Conduct does not adequately address the lawyer's obligation to insure candor to the court.

III. A PROPOSED SOLUTION

The Defense Standards suggest that every jurisdiction establish an Advisory Council of eminent trial lawyers to assist attorneys in resolving ethical questions:

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94. *Id.*

95. But rule 3.6 of the Code of Conduct states: "[a] lawyer shall not knowingly participate in creating perjured testimony, other false evidence, or a misrepresentation upon which another person is likely to rely and suffer material detriment." Therefore, although an attorney may not "knowingly participate" in creating perjured testimony, if the perjured testimony is a result of the client's decision, the attorney does not commit a disciplinary violation by developing the client's direct testimony and arguing it to the jury. *Id.* at 110, Illustrative Case 1(j).

96. *See id.* at 109, Illustrative Case 1(i).

97. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 95 (2d ed. 1972); Robinson, *supra* note 17, at 547 n.10.

98. Lefstein, *supra* note 52, at 674. There is, however, some evidence that practicing attorneys favor Professor Freedman's approach. *Id.* at 675.

99. STANDARDS (1st ed.), *supra* note 1, STANDARDS RELATING TO THE DEFENSE FUNCTION, at 142.

> Advisory councils on professional conduct
>
> (a) In every jurisdiction an advisory body of lawyers selected for their experience, integrity, and standing at the trial bar should be established as an advisory council on problems of professional conduct in criminal cases. This council should provide prompt and confidential guidance and advice to lawyers seeking assistance in the application of standards of professional conduct in criminal cases.
>
> (b) Communications between a lawyer and such an advisory council should have the same privilege for protection of the client's confidences as exists between lawyer and client. The council should be bound by statute or rule of court in the same manner as a lawyer is bound not to reveal any disclosure of the client except
>
> (i) if the client challenges the effectiveness of the lawyer's conduct of the case and the lawyer relies on the guidance received from the council, and
>
> (ii) if the lawyer's conduct is called into question in an authoritative disciplinary inquiry or proceeding.[100]

To date, no jurisdiction has adopted the standard relating to Advisory Councils.[101] The concept, however, can be used to reach a practical and ethically sound solution to the lawyer's dilemma.[102]

Under the Advisory Council concept, when defense counsel learns, prior to trial, that his client intends to commit perjury, he must submit a written statement to the Council, documenting to the extent possible the facts which establish the basis for the conclusion that the accused client intends to offer false testimony. The statement should also set forth the efforts which defense counsel has made to persuade the client not to testify falsely. If the Council determines that the written statement substantiates the lawyer's belief that his client intends to commit perjury, the Council then shall recommend to the court that the lawyer be allowed to withdraw. The Council's recommendation should appear on the outside of a sealed file which contains a documented and complete record of the Advisory Council's proceedings. The file is then delivered to the court. If the Advisory Council recommended that the lawyer be permitted to withdraw, the court must grant the motion and advise the defendant regarding subsequent procedures and that the sealed materials may be used for impeachment at any subsequent trial. Thereafter, the defendant has a new right to appointed or hired counsel.[103]

If the defendant elects to adhere to the same version of the facts, his new

100. DEFENSE STANDARDS, *supra* note 6, at 4-1.4. The Advisory Council idea is borrowed from England, where a somewhat similar body has existed for some years. *See* R. WALKER & M. WALKER, THE ENGLISH LEGAL SYSTEM 226 (4th ed. 1976). *See also* Hoolihan, *Ethical Standards for Defence Counsel*, STUDIES IN CRIM. L. & PROC. (Canadian Bar Association 1973); Schroeder, *Some Ethical Problems in Criminal Law*, L.S.U.C. Special Lectures 87 (1963).

101. DEFENSE STANDARDS, *supra* note 6, at 4-1.4, commentary at 4.18.

102. Ideally, an Advisory Council should be established in each judicial district within the state.

103. The Advisory Councils will advise lawyers on a broad range of ethical problems, such as threats by clients against his lawyer, conflicts of personality, and conflicts of interest. Therefore, the court will be unaware of the defendant's prior intention to commit perjury. At this juncture, it is only apparent that an irreconcilable conflict between the lawyer and his client mandates withdrawal.

counsel would have no basis for knowing that the defendant intends to commit perjury, and the case would proceed to trial. The Advisory Council's file would remain sealed unless the defendant elects to take the witness stand. At that point, the court is authorized to open the file and review its contents. If the file establishes that the defendant intended to commit perjury at his first trial, the contents would be disclosed to both prosecution and defense counsel. When the defendant testifies, the prosecution may use the information contained in the file for impeachment.[104] Defense counsel is permitted to fully develop his client's testimony on direct examination, and may advocate acceptance of his client's testimony in closing argument, because his client's credibility is for the jury to determine, and the attorney is not sponsoring testimony known to be false. The defendant's credibility, of course, will be weighed against his prior inconsistent statements to his former lawyer, which the prosecutor will use for impeachment purposes. In this way, the truth-finding goal of the adversary system is not compromised.[105]

If the new counsel discovers, prior to trial, that the defendant intends to commit perjury, he must also submit a written statement to the Advisory Council, documenting the facts which establish the proposed perjury. Upon receipt of a second file which recommends withdrawl, the court must open both files to determine if the defendant's intention to commit perjury is the basis for withdrawal in both cases. If such is the case, the court will not permit counsel to withdraw, and the defendant will be deemed to have waived his privilege to testify in his own behalf.[106] The defendant's privilege thus gives way so that the lawyer is not required to develop and argue known false testimony.[107] Such a procedure prevents use of the same ploy for unlimited continuances. The judge may also consider the mendacity of the defendant in sentencing.[108] Again, the truth-finding goal of the adversary system is not compromised because the defendant is prohibited from offering perjured testimony.

The ethical dilemma created by the perjurious defendant may also arise in another setting. If defense counsel does not learn of his client's intended perjury until trial is imminent or has commenced, he must still make a motion to withdraw under the Council system. Defense counsel cannot specify the reasons for his motion, but should request a brief recess to present the ethical dilemma to the Advisory Council. The trial court must grant the recess so that the Advisory Council procedure can be followed. If the Council recommends withdrawal, the trial court, under the doctrine of manifest

104. *See* Harris v. New York, 401 U.S. 222 (1971). Either the prosecution or the defense must then be permitted to call the first defense counsel as a witness, in order to preserve the defendant's right of confrontation under the sixth amendment. *See* California v. Green, 399 U.S. 149 (1970). Moreover, the admission of the first lawyer's statements contained in the file may be subject to a hearsay objection by the defendant.

105. *See* DEFENSE STANDARDS, *supra* note 6, at Introduction.

106. *Id.*

107. The lawyer vouches for the authenticity of the evidence he submits at trial. *See* C. MCCORMICK, *supra* note 97.

108. *See* United States v. Grayson, 438 U.S. 40 (1978).

necessity,[109] must grant defense counsel's motion to withdraw and declare a mistrial.

The establishment of an Advisory Council is within the rule-making power of the highest court of each state.[110] For example, in Colorado, the Supreme Court has both constitutional and statutory authority to promulgate rules governing practice and procedure in criminal cases.[111] The Defense Standards generally provide that the communications between a lawyer and the Advisory Council have the same privilege for the protection of the client's confidences as exists between the lawyer and client.[112] Therefore, the rule in each jurisdiction which creates an Advisory Council must also provide for a limited waiver of the attorney-client privilege to permit impeachment as a means of protecting the integrity of the truth-finding goal of the adversary system.[113] Consequently, a limited waiver of the attorney-client privilege is justified when the court is authorized to open the sealed file and reveal its contents to the prosecutor for impeachment purposes.[114]

It should be kept in mind that the lawyer's dilemma occurs infrequently in practice. Accordingly, the intricacies of the proposed solution are justified. The Advisory Council solution resolves the ethical dilemma which has been analyzed and reanalyzed so often.

IV. CONCLUSION

The common law adversary system as a means for ascertaining the truth of a criminal charge can survive only if both prosecution and defense counsel present reliable evidence to guide the trier of fact. Truth-finding is deflected whenever perjury is committed. As officers of the court, lawyers have a primary duty to preserve the integrity of the adversary system by preventing the court or jury from being misled by the presentation of false or perjured testimony. Even the attorney-client privilege must bend when the sanctity of the oath is disregarded by an accused client proferring false evidence. The obligations of defense counsel to the court and to his client are in direct conflict under the current ABA Code. The author's solution to the dilemma balances the ethical considerations in such a way that the lawyer is not forced to advocate the acceptance of perjured testimony. Perjury is exposed with the least possible invasion of the attorney-client privilege.

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109. *See* United States v. Jorn, 400 U.S. 470, 485 (1970); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

110. J. PARNESS & C. KORBAKES, A STUDY OF THE PROCEDURAL RULEMAKING POWER IN THE UNITED STATES (American Judicature Society 1973).

111. COLO. CONST. art. 6, § 21; COLO. REV. STAT. § 13-2-109 (1973).

112. DEFENSE STANDARDS, *supra* note 6, at 4-1.4, commentary at 4-1.8.

113. The attorney-client privilege is a substantive right. *See* COLO. REV. STAT. § 13-90-107(b) (1973). It is within the province of the judiciary, however, to determine the procedural limitations imposed on the privilege. *See, e.g.*, People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978).

114. The rule should be tightly drafted to prevent the disclosure of any privileged communications unrelated to the perjury between the client and lawyer or between the lawyer and the Advisory Council. Additionally, the rule should permit either the prosecutor or the defense lawyer to call the first defense lawyer who was confronted with the dilemma to testify as to the facts which were before the Advisory Council.

STANDARDS GOVERNING LEGAL STATUS OF PRISONERS

B.J. GEORGE, JR.*

INTRODUCTION

The bulk of the *Standards for Criminal Justice*[1] (*Standards*) relates to the conduct of criminal proceedings and the professional activities of lawyers and judges. In contrast, at either end of the spectrum of the criminal process—law enforcement administration and corrections—the roles of legal professionals are less well defined and the claims of professionals in the other concerned professions to remain free from domination by judges and attorneys carry considerable weight. Nevertheless, citizens have clear legal rights during both the inception of criminal investigations and the enforcement of criminal sanctions. These legal rights merit effective implementation through courts and administrative organs. On these matters the organized bar is competent and obliged to speak. Both the first and second editions of the *Standards* have addressed selected law enforcement problems in the chapter on *Urban Police Function*.[2] It was not until the second edition *Standards* were far along in preparation, however, that a decision was reached to prepare standards relating to the legal status of prisoners.

Indeed, that decision was arrived at rather late in a sequence of American Bar Association (ABA) activities which had their inception in an address by Chief Justice Warren E. Burger, delivered at the 1969 ABA annual meeting, where he urged the legal profession to focus its concern and abilities on the administration of the nation's correctional systems.[3] A few months later, the ABA House of Delegates created a Commission on Correctional Facilities and Services which, among its several reports and monographs, produced a first tentative draft of standards relating to the legal status of prisoners.[4] When the Commission and the Section of Criminal Justice presented the draft to the House of Delegates in 1978, the House referred it to the Standing Committee to resolve points of conflict with correctional authorities. The committee in turn developed three successive drafts. The fourth tentative draft was modified in several respects before final adoption by the House in February 1981, when the draft became a new chapter

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1. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980).

2. *Id.* ch. 1.

3. Burger, A Proposal: A National Conference on Correctional Problems, MONOGRAPH 3, ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, Edited Proceedings 1 (1969, Dallas, Texas) (luncheon address presented at the annual ABA meeting to the Sections on Individual Rights and Responsibilities, Criminal Law, Bar Activities, Judicial Administration, and the Special Committee on Crime Prevention and Control).

4. CRIMINAL JUSTICE SECTION PROJECT ON STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS (Tent. Draft No. 1), 14 AM. CRIM. L. REV. 377 (1977).

twenty-three of the *Standards*.[5]

The *Legal Status of Prisoners Standards*[6] (LSOP) constitute but one of several national and international bodies of rules or standards. The United Nations has undertaken to implement the premise that no person should be subjected to cruel, inhuman, or degrading treatment or punishment.[7] The United States National Advisory Commission on Criminal Justice Standards and Goals in 1973 issued detailed standards bearing on correctional administration,[8] and the National Conference of Commissioners on Uniform State Laws covered many of the same concerns in its *Model Sentencing and Corrections Act*.[9] Since 1975, the American Correctional Association and the Commission on Accreditation for Corrections have published ten volumes of standards to govern accreditation of correctional facilities. Three of those volumes bear substantially on the problems dealt with in the ABA *Standards*.[10] Most recently, the United States Department of Justice issued standards governing prisons and jails for use in federal penal administration.[11] Thus, during the 1980s there is no dearth of guidelines for correctional administration and judicial evaluation of the country's penal facilities.

This article surveys the legal and administrative status of prisoners under the several contending standards, noting in the process the points on which the ABA *Standards* diverge substantially from other bodies of principles.

I. PRINCIPAL RIGHTS OR CLAIMS OF PRISONERS

A. *Basic Principle*

It must be stressed that the ABA's choice of the word "status", rather

5. ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS (Approved Draft, 1981) [hereinafter cited as LSOP].

6. *Id.*

7. *Declaration on the Protection of All Persons From Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (G.A. Res. 2200, U.N. DOC. A/34/273 Annex *passim* [June 6, 1979]); *International Covenant on Civil and Political Rights*, art. 7, 10 (G.A. Res. 2200 A[XXI] [December 16, 1966]); *Standard Minimum Rules for the Treatment of Prisoners* (U.N. DOC. Sales No. 1956 IV.4, Annex [1958] [hereinafter cited as *U.N. Standard Minimum Rules*]); *Universal Declaration of Human Rights*, art. 5 (G.A. Res. 217A [III] [December 10, 1948]). *Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* (A/34/146, Annex [September 11, 1979]) is under circulation to member states for comments. United Nations materials at times are cited in American prison litigation. *See, e.g.*, Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123, 131 n.21 (1981).

8. U.S. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS (1973) [hereinafter cited as NAC CORRECTIONS].

9. 10 UNIFORM RULES OF CRIMINAL PROCEDURE, MODEL SENTENCING AND CORRECTIONS ACT, (Approved Draft, 1979) [hereinafter cited as MODEL ACT].

10. AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (2d ed. 1981) [hereinafter cited as ACA-ACI]; STANDARDS FOR ADULT LOCAL DETENTION FACILITIES (2d ed. 1981) [hereinafter cited as ACA-ALDF]; STANDARDS FOR THE ADMINISTRATION OF CORRECTIONAL AGENCIES (1979) [hereinafter cited as ACA-ACA]. *See also* note 312 *infra*.

11. U.S. DEP'T OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAILS (Dec. 16, 1980) [hereinafter cited as DOJ]. *See also* changes in the preamble, 46 Fed. Reg. 39515 (Aug. 3, 1981). The National Sheriffs Association issued a set of seven monographs in 1974 governing local jail administration, which are available from the ABA, 1250 Connecticut, Suite 320, Washington, D.C. 20036.

than the word "rights", of prisoners was not casual or heedless. It was, instead, a statement of philosophy that the purpose of the ABA is not to provide an advance guard in a drive to expand prisoner rights beyond those now recognized by courts and legislatures, but to delineate the position of prisoners in relation to free citizens, on the one hand, and governmental authority, on the other. That is the thrust of standard 23-1.1:

> Prisoners retain the rights of free citizens except: (a) as specifically provided to the contrary in these standards; or (b) when restrictions are necessary to assure their orderly confinement and interaction; or (c) when restrictions are necessary to provide reasonable protection for the rights and physical safety of all members of the prison system and the general public.[12]

This restates in essence the constitutional principles enunciated by the United States Supreme Court.[13] Standard 23-1.1 sets out a general philosophy which, however, is subject to qualification by the language of more specific standards.

B. *Reception, Classification, Assignment, and Transfer*

Classification is necessary in any prison system having more than one general holding facility. A failure to provide a diversity of classifications itself violates modern notions of penal administration.[14] There are at least three bases for categorizing correctional facilities:

1. Security Classifications

Traditionally, facilities in the United States have been categorized as maximum, medium, and minimum security institutions, without any particular standards according to which a designation can be made. The operative issue, from the standpoint of individual prisoners, is the extent to which freedom of movement is controlled within a facility. On such a basis one may perceive, in decreasing order of severity, administrative segregation, maximum custody, close custody, medium security, minimum security, and community status.[15] Unless facilities are categorized, rational assignment of individual prisoners is difficult to achieve.

2. Classification According to Objective Personal Characteristics

To some extent everywhere, separate facilities are provided for adults and young offenders, male and female offenders, pre- and post-adjudication detainees, and civilly and criminally incarcerated persons.[16] Classification

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12. LSOP, *supra* note 5, § 23-1.1.

13. Bell v. Wolfish, 441 U.S. 520, 544-48 (1979); *see also* Rhodes v. Chapman, 101 S. Ct. 2392, 2400 n.13 (1981).

14. ACA-ACI, *supra* note 10, § 2-4399; ACA-ACA, *supra* note 10, §§ 25, 27.

15. *E.g.*, MICH. ADMIN. CODE R. 791.4401(3) (1977). The discussion to ACA-ACI, *supra* note 10, § 2-4401, recommends at least three degrees of custodial control for inmates. The MODEL ACT, *supra* note 9, § 4-402, contains somewhat different criteria: each facility or portion of a facility should be given a security classification based on the extent of perimeter security, freedom of movement of confined persons within a facility, nature of programs in a facility, and the extent of regimentation of confined persons within a facility.

16. *See, e.g.*, DOJ, *supra* note 11, §§ 9.03-.05; ACA-ACA, *supra* note 10, §§ 2, 11-13, 16, 26;

under such a system is objective and mechanical; the primary limitation is that no discriminatory use can be made of external factors, particularly race, religion, sex, age, or handicapped status.[17]

3. Classification Based On Individualized Treatment Needs

Penal legislation determines the extent to which prisoners are to be provided programs tailored to fit individual needs. If offender rehabilitation is the principal or a significant objective of a criminal justice system, and deterrence of future criminal conduct and segregation or incapacitation are of minimal significance, then substantial financial and personnel resources will be devoted to "treatment" of offenders.[18] In contrast, if rehabilitation largely has been abandoned as a goal of a prison system and incarceration for a determinate or relatively fixed term is either punishment to deter crime or a means of segregating dangerous persons from society,[19] then subjective personal characteristics of individual prisoners will play a relatively small role in penal administration, and classification largely will turn on factors in (1) and (2) above.

4. Administrative Procedures Affecting Classification

Correctional standards are more concerned with administrative procedures affecting classification than they are with criteria for classification generated in substantive law. Granted that conceptual limitation, there are several important dimensions of prisoner claims and protections in the setting of classification:

Time of classification. Classification should be conducted as soon after a prisoner has been received in a prison system or facility as is possible in light

ACA-ACI, *supra* note 10, §§ 2-4332; ACA-ALDF, *supra* note 10, § 2-5354—5355. A "Central Monitoring Case" (CMC) system instituted by the Federal Bureau of Prisons imposes stricter controls over some prisoners than others because of their criminal careers. Attacks have been made on assignment to such a status without a prior administrative hearing, with varying results. *Compare* Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980) (no hearing required) *with* Bryant v. Carlson, 489 F. Supp. 1075 (M.D. Pa. 1980) (hearing required).

17. LSOP, *supra* note 5, § 23-6.14; DOJ, *supra* note 11, § 1.02; MODEL ACT, *supra* note 9, § 4-111; ACA-ACI, *supra* note 10, § 2-4340; ACA-ALDF, *supra* note 10, § 2-5356; *see also* U.N. *Standard Minimum Rules, supra* note 7, R. 6(1). This is federal constitutional doctrine. Lee v. Washington, 390 U.S. 333 (1968); Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974); Glover v. Johnson, 510 F. Supp. 1019 (E.D. Mich. 1981).

18. This is the clear objective of U.N. *Standard Minimum Rules, supra* note 7, R. 67(b), 69; *see also id.* R. 8 ("necessities of their treatment"), 59 ("individual treatment needs of the prisoners"). The ABA SENTENCING ALTERNATIVES AND PROCEDURES STANDARDS, *supra* note 1, ch. 18, particularly §§ 18-2.1, -4.1, embody a similar approach even though deterrence and segregation loom larger in the current standards than they did in the first edition. *See, e.g., id.* §§ 18-2.5, -3.2.

19. Current controversies over determinate or presumptive sentencing are reflected in recent works, *e.g.*, N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); J. WILSON, THINKING ABOUT CRIME (1975); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); UNITED STATES NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, DETERMINATE SENTENCING: REFORM OR REGRESSION? (Summary Report March, 1978).

of the need to accumulate data appropriate to a classification decision.[20] Although the ABA standard recognizes some flexibility in completing classification,[21] it recommends a thirty-day period which corresponds to other standards covering the matter.[22]

Place of classification. None of the standards attempts to regulate the location of classification. It can be done at a central diagnostic facility and probably must be accomplished in that way if courts are not empowered to designate facilities to which convicted prisoners must be sent. After a first classification and assignment have been made, each institution then has a mechanism either for placement at a level of custody and programming within that institution or, if for a designated period a prisoner is assigned the highest security category within the institution, for reclassification and reassignment after an appropriate time has elapsed. Further transfers within a prison system are subject to central administrative control.[23] The ABA *Standards* properly are silent on what is a purely administrative matter.

Classification procedures. The ABA *Standards* are not silent as to procedures pursuant to which classification decisions are reached. American standards generally contemplate an active role for prisoners during classification which contrasts, favorably in the author's view, with the U.N. *Standard Minimum Rules*[24] and practices in many other nations in which prisoners play a passive, receptive role.

Due process of law does not mandate that classification or reclassification be conducted according to procedures required for major disciplinary proceedings,[25] even though prisoner misconduct may have impelled administrative review.[26] Consequently, the ABA *Standards*,[27] like other rules and

20. At reception and classification, a legal basis for confinement must be documented, *e.g.*, DOJ, *supra* note 11, §§ 8.02, .04, .05; ACA-ALDF, *supra* note 10, §§ 2-5099, -5344 and complete records must be maintained on all prisoners subject to appropriate audit controls. ACA-ACI, *supra* note 10, §§ 2-4115—4117.

21. LSOP, *supra* note 5, § 23-3.4(a) brackets the figure thirty, indicating scope for flexibility.

22. DOJ, *supra* note 11, § 9.07 recommends four weeks and MODEL ACT, *supra* note 9, § 4-408(c) thirty days.

23. ACA-ACI, *supra* note 10, § 2-4400 (discussion), suggests only that there should be "specific procedures relating to inmate transfer . . . from one institution to another."

24. U.N. *Standard Minimum Rules, supra* note 7, R. 69 ("a programme of treatment shall be prepared for him"). Interviews by the author with prison administrators in Japan and the People's Republic of China confirm that in those nations prisoners have no positive role to play in the determination of work or educational programs in which they are required to participate.

25. *See* text accompanying notes 273-94 *infra*.

26. Montanye v. Haymes, 427 U.S. 236 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Goodnow v. Perrin, 421 A.2d 1008 (N.H. 1980) (even though transfer was to federal prison in Pennsylvania). However, if some prisoners are allowed a hearing before a change in program assignment, a failure to grant such a hearing to all prisoners within an eligible class may deny equal protection. Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978). A state system of course is free to institute a hearing system under its own law, *In re* Westfall, 102 Cal. App. 3d 328, 162 Cal. Rptr. 462 (1980), and this may engender an entitlement to an administrative due process hearing under federal doctrine. Garcia v. De Batista, 642 F.2d 11 (1st Cir. 1981); Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980); Dickerson v. Warden of Marquette Prison, 99 Mich. App. 630, 298 N.W.2d 841 (1980).

27. LSOP, *supra* note 5, § 23-3.4(a)-(d).

standards,[28] contemplate that procedures be as informal as possible. However, explanations must be given to prisoners about the classification process, the options open to them, and the criteria by which decisions are reached. The initial classification recommendations must also be communicated to prisoners and to a classification committee. Although some lawyers and others deeply concerned about prisoner rights have maintained that even initial classification decisions should be adversary in nature, including participation by counsel for prisoners desiring representation,[29] an emerging consensus holds that adversarial proceedings are inimical to proper classification and reclassification. The use of adversarial proceedings reflects an "over-lawyering" which has characterized many dimensions of social welfare administration in the United States during the past two decades.

Nevertheless, standards governing prisoner status must take account of the possibility of abuse of discretion by classification officials. The *Standards* provide an initial check through a routine review by a classification committee of preliminary classification decisions,[30] and then allow a formal classification hearing at the request of a prisoner dissatisfied with a provisional classification or reclassification decision.[31] No special provision is made for further administrative or judicial review of classification matters, because the *Standards* envision grievance procedures based on a broad array of prisoner complaints.[32]

Reclassification. Initial classification determinations cannot be allowed routinely to stand intact without further evaluation throughout a prisoner's period of incarceration. The approach of the *Standards* is to require routine periodic review at a recommended interval of six months and to allow prisoners to impel classification hearings if they are dissatisfied with refusals on the basis of a document review to revise an earlier classification.[33] No provision is made in the ABA *Standards* for interim review at the request of a prisoner, unlike some other standards.[34]

28. DOJ, *supra* note 11, § 9.02; MODEL ACT, *supra* note 9, § 4-408; ACA-ACI, *supra* note 10, §§ 2-4400, -4403, -4407.

29. *See, e.g.*, LSOP (Tent. Draft No. 1), *supra* note 4, at 455-58, § 3.5 and commentary; MODEL ACT, *supra* note 9, § 4.412(a)(1)-(iii).

30. LSOP, *supra* note 5, § 23-3.4(e)-(f). A similar approach is taken in DOJ, *supra* note 11, §§ 9.02, .09, .10; ACA-ACA, *supra* note 10, §§ 32-36; ACA-ACI, *supra* note 10, §§ 2-4400, -4405—4407; *see also* MODEL ACT, *supra* note 9, §§ 4-408, -412, -413.

31. LSOP, *supra* note 5, § 23-3.4(g) governs the troubling matter of the impact of pending detainers on classification. It provides that no consideration should be given to detainers pending more than a recommended six month period, on which there has been no action by the requesting entity despite a prisoner demand. Other detainers may be considered but should not be given controlling weight in assigning security classifications.

32. LSOP, *supra* note 5, §§ 23-7.1(d)(vii); *see* text accompanying notes 210-26 *infra*.

33. *Id.*, § 23-3.4(c), (e).

34. DOJ, *supra* note 11, § 9.08 (12 month interval, or more frequently as needed; inmates may request reviews of their progress and status, and request changes in program assignments, at any time); ACA-ACI, *supra* note 10, § 2-4407 (discussion indicates that inmates should be allowed to initiate reviews at any time to determine the extent of their progress and the effectiveness of their programming).

C. *Circumstances of Confinement*

Prison conditions "may deprive inmates of the minimal civilized measure of life's necessities," and so can "be cruel and unusual under the contemporary standard of decency"[35] developed by the Supreme Court under the eighth amendment. Nevertheless, "to the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[36] Granted such a limited scope of constitutional control over prison circumstances, criminal justice standards have a very substantial role to play in establishing criteria by which legislators and correctional administrators should govern penal institutions and by which courts can determine issues of constitutional adequacy.

Norms in light of which correctional facilities are accredited or inspected must be precise and incorporate by reference health and safety standards embodied in administrative regulations, inspection codes, and the like.[37] The drafters of the ABA *Standards* recognized in this context that it is inappropriate for the ABA to parrot, and particularly to endeavor to improve upon, detailed criteria in other standards governing matters like institutional size and location, cell or dormitory dimensions, lighting, ventilation, toilet and bathing facilities, and laundry facilities. Administrators, legislators, and judges wishing detailed norms can find them in correctional standards. Consequently, the *Standards* set forth only general concepts essentially congruent with contemporary constitutional precedent.[38]

Thus, correctional institutions should meet health, sanitation, fire, and industrial safety codes applicable to private residential facilities or public buildings like schools and hospitals, as well as any state standards directly governing correctional facilities.[39] Although correctional administrators bear a principal burden in practice to see that compliance is constant, they cannot be given sole responsibility. Therefore, the *Standards* call for regular inspections by qualified inspectors independent of the facility or agency undergoing inspection.[40] In contrast to correctional standards, the ABA is directly concerned about enforcement of health and safety standards and calls for the same enforcement sanctions, including abatement, and procedures

35. Rhodes v. Chapman, 101 S. Ct. 2392, 2399 (1981). *See also* Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981).

36. Rhodes v. Chapman, 101 S. Ct. at 2399.

37. *See, e.g.*, DOJ, *supra* note 11, §§ 2.01-4.16; ACA-ACI, *supra* note 10, §§ 2-4127—4175.

38. LSOP, *supra* note 5, § 23-6.13. NAC CORRECTIONS, *supra* note 8, § 2.5 takes a like approach.

39. LSOP, *supra* note 5, § 23-6.13(a)(i)-(ii). Section 6.13(c) lists heating and ventilation systems to maintain humane comfort, natural and artificial light in living quarters sufficient to permit reading, an adequate balanced diet, adequate, clean and functioning private toilet and other facilities to maintain personal cleanliness, freedom from excessive noise, clean clothing and bedding appropriate to the season, and varied opportunities for daily physical exercise and recreation. A cross-reference is included to medical care. *See* text accompanying notes 46-60 *infra*.

40. *Id.* § 23-6.13(a)(iii). The preference, expressed through bracketed material, is for inspections at least annually, the frequency expressed also in DOJ, *supra* note 11, § 3.01 and ACA-ACI, *supra* note 10, §§ 2-4255 (sanitation and health), -4162, -4164 (fire and related safety facilities must be certified as in code compliance by independent qualified sources, and inspected annually). Accreditation standards require daily or weekly inspections by qualified administrators of each institution. *Id.* §§ 2-4163, -4248.

governing other facilities subject to public regulatory codes.[41]

Some standards express a clear preference for single-occupancy cells over dormitory quarters,[42] although clearly that is not a constitutional minimum standard.[43] The ABA *Standards* align basically with that position, in that prisoners in other than residential (community corrections) facilities "should have the opportunity to have their own separate living quarters of adequate size."[44] However, some inmates clearly prefer communal living if quarters are adequately supervised. The standard provides specifically for staffing and other means of supervision sufficient for that purpose.[45] Safety-related surveillance poses a conflict with inmate claims to privacy. The *Standards* can do no more than to urge that inmates not in separate living quarters be given at least some opportunity daily for personal privacy. There is no bar intended, however, against the use of closed-circuit television surveillance of either single- or multiple-occupancy quarters to ensure prisoner safety and compliance with institutional safety and health regulations.

The ABA takes no position for or against disciplinary detention[46] as long as it is specifically provided for through adequately disseminated institutional rules and does not violate the principle of parsimony because disproportionate to the seriousness of misconduct for which it is a sanction.[47] If, however, prisoners are placed in a restrictive category and specially housed, whether by way of disciplinary segregation or special administrative classification, they are not to be deprived of whatever is needed to maintain mental and physical well-being, including books or other reading matter, mail, physical exercise, items for personal care and hygiene, medical care,

41. LSOP, *supra* note 5, § 23-6.13(a)(iv).

42. NAC CORRECTIONS, *supra* note 8, § 2.5(1); ACA-ACI, *supra* note 10, § 2-4129; *cf. id.* § 2-4131 (multiple occupancy rooms must house not less than 3 nor more than 50 inmates; facilities are specified in detail). DOJ, *supra* note 11, § 2.02 provides that single-occupancy cells must house only one inmate.

43. Rhodes v. Chapman, 101 S. Ct. 2392 (1981).

44. LSOP, *supra* note 5, § 23-6.13(b).

45. Inmates have a constitutional claim to protection against physical or sexual assaults by other inmates, Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); Leonardo v. Moran, 611 F.2d 397 (1st Cir. 1979); Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978), *cert. denied*, 439 U.S. 837 (1978); Little v. Walker, 552 F.2d 193 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978), and therefore institutions must have enough staff to ensure inmate safety. Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977). Assaults by staff members also must be prevented. Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974).

46. Accreditation standards use the term segregation to encompass administrative segregation (based on a serious threat to life, property, self, staff, or other inmates or to the security or orderly running of an institution), protective custody (designed to safeguard inmates either at their request or according to a determination that they are in jeopardy), and disciplinary detention. ACA-ACI, *supra* note 10, § 2-4214 and discussion; *see also* DOJ, *supra* note 11, ch. 11. On administrative procedures required for transfers to administrative segregation, *see* Parker v. Cook, 642 F.2d 865 (5th Cir. 1981); Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980); Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980); Dickerson v. Warden of Marquette Prison, 99 Mich. App. 630, 298 N.W.2d 841 (1980). Whether solitary confinement constitutes cruel and unusual punishment turns on the circumstances as well as the duration of such detention. Hutto v. Finney, 437 U.S. 678 (1978); Littlefield v. Deland, 641 F.2d 729 (10th Cir. May 12, 1981); Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981); Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981). *See generally* NAT'L ASS'N OF ATTORNEYS GENERAL, ADMINISTRATIVE SEGREGATION OF PRISONERS: DUE PROCESS ISSUES (1979).

47. LSOP, *supra* note 5, § 23-3.1; *see* text accompanying note 266 *infra*.

light, ventilation, regular diet, and visiting or oral communication opportunities with other persons. Conditions cannot unnecessarily cause physical or mental deterioration.[48]

D. *Medical Care and Delivery of Health Services*

Deliberate indifference to the serious medical needs of prisoners constitutes "unnecessary and wanton infliction of pain"[49] forbidden by the eighth amendment. Because inadequate delivery of health services has been prominent in prisoner litigation, the ABA *Standards* address basic concepts in some detail, although not to the same extent as do the American Medical Association[50] and accrediting agencies.[51]

The basic constitutional standard is restated in section 23-5.1(a).[52] No effort is made to specify the qualifications of those who provide medical care in prisons, beyond requiring that they possess those qualifications expected of medical care personnel performing like functions in the free community.[53] Unlike the Model Act,[54] the *Standards* embody no right of prisoners to resort to private medical care at personal expense, but neither do they condemn it under the broad language of section 23-5.2(a). Although there can be no unjustified sex discrimination under the *Standards*,[55] it is appropriate to provide suitable prenatal and postnatal care for women prisoners.[56]

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48. *Id.* § 23-6.14(d). *Accord*, DOJ, *supra* note 11, §§ 11.07-.24; ACA-ACI, *supra* note 10, §§ 2-4221—4237. The prohibition against physical or mental deterioration restates a constitutional standard. Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); Laaman v. Helgemoe, 437 F. Supp. 269, 310 (D. N.H. 1977).

49. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). The right includes emergency treatment, Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974), and covers physical conditions requiring medical treatment, Cotton v. Hutto, 540 F.2d 412 (8th Cir. 1976); Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974); Robinson v. Jordan, 494 F.2d 793 (5th Cir. 1974), psychiatric needs, Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977); Williams v. Edwards, 547 F.2d 1206, 1217-18 (5th Cir. 1977), and dental care, *id.* at 1217; Barnes v. Virgin Islands, 415 F. Supp. 1218, 1235 (D.V.I. 1976); Stokes v. Hurdle, 393 F. Supp. 757 (D. Md. 1975), *aff'd sub nom.* Stokes v. Brown, 535 F.2d 1250 (4th Cir. 1976).

50. STANDARDS FOR HEALTH SERVICES IN PRISONS (1979); STANDARDS FOR HEALTH SERVICES IN JAILS (1979).

51. ACA-ACI, *supra* note 10, §§ 2-4271—4322.

52. LSOP, *supra* note 5, § 23-5.1(a).

53. *Id.* § 23-5.1(b). Institutional hospitals must meet the same standards as licensed general hospitals. *Id.* § 23-5.1(c). ACA-ACI, *supra* note 10, § 2-4284 requires appropriate state or federal licensure. The discussion to DOJ, *supra* note 11, § 5.06 notes that requirements of the United States Public Health Service Commission Corps or the Office of Personnel Management govern employment in federal institutions. Use of unlicensed, inadequately trained inmates as sole providers of health care falls below minimum constitutional standards, Ramos v. Lamm, 639 F.2d 559, 576 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); Williams v. Edwards, 547 F.2d 1206, 1215-18 (5th Cir. 1977), but if qualified professional staff is present there seems to be no objection under either constitutional principles or the *Standards* to using inmates as orderlies and the like, as long as they do not control scheduling of health care appointments or access to health care services, or have access to surgical instruments, syringes, needles, medications, and health records. *See* DOJ, *supra* note 11, § 5.37; ACA-ACI, *supra* note 10, § 2-4288; AMA STANDARDS FOR HEALTH SERVICES IN PRISONS ¶ 133 (1979). LSOP, *supra* note 5, § 23-5.6 prohibits administration of drugs by inmates under any circumstances.

54. MODEL ACT, *supra* note 9, § 4-105(c).

55. LSOP, *supra* note 5, § 23-6.14; *see also* Glover v. Johnson, 510 F. Supp. 1019 (E.D. Mich. 1981).

56. LSOP, *supra* note 5, § 23-5.7(a); *see also* DOJ, *supra* note 11, § 5.49. LSOP, *supra* note 5, § 23-5.7(b) contemplates the possibility of nursery facilities in institutions so that inmate

Adequate health care under the *Standards* requires that prisoners be given a comprehensive medical, psychiatric, and dental examination within a short time after admission to a correctional facility,[57] at regular intervals thereafter,[58] and upon release from confinement.[59] Maintenance of professionally adequate health records also is indispensable to proper health protection. The *Standards* contemplate records compiled according to accepted medical standards, maintained in a confidential and secure manner during confinement and for a recommended five-year period following discharge.[60]

Prisoners possess the same rights to accept or reject health care as do citizens generally. Therefore, the *Standards*[61] recognize that prisoners may decline either examination or treatment unless (a) it is required by court order,[62] (b) a responsible physician reasonably believes it necessary to detect or treat communicable diseases or otherwise to protect the health of other persons,[63] or (c) the condition is emergent and treatment is necessary to pre-

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mothers may keep their children for at least a reasonable time pending longer-range custodial arrangements. Other standards, *e.g.*, DOJ, *supra* note 11, § 5.49; ACA-ACI, *supra* note 10, § 2-4333, go no further than to recommend prenatal counseling concerning child placement; DOJ, *supra* note 11, § 5.49 recommends arrangements for childbirth off institutional premises. There is no right, apparently, to insist on retaining infants for a time within an institution. Wainwright v. Moore, 374 So. 2d 586 (Fla. App. 1979) (interpreting statute). It may be that women prisoners cannot be required to give up their children without valid supporting reasons other than incarceration. Apgar v. Beauter, 75 Misc. 2d 439, 347 N.Y.S.2d 872 (Sup. Ct. 1973) (interpreting statute).

57. LSOP, *supra* note 5, § 23-5.3(a), (b)(i) (recommended within two weeks after admission); *see also* DOJ, *supra* note 11, §§ 5.15-.16; ACA-ACI, *supra* note 10, §§ 2-4290—4291. Preconviction detainees also should be given a thorough physical and dental examination upon personal request if confinement will last more than two weeks. LSOP, *supra* note 5, § 23-5.3(c).

58. LSOP, *supra* note 5, § 23-5.3(b)(ii) (recommended maximum interval of two years). *See also* DOJ, *supra* note 11, § 5.45; ACA-ACI, *supra* note 10, § 2-4302 (discussion recommends annual examinations for inmates over 50, and biennial examinations for those younger than 50). There must of course be independent medical care and diagnosis available at any time, and regular daily sick calls to meet prisoner needs, a matter independent of routine medical examinations. LSOP, *supra* note 5, §§ 23-5.1(a), -5.2. If care and, presumably, adequate diagnosis cannot be provided within a prison facility or system, a prisoner patient must be transferred to a civil health facility with the needed facilities. *Id.* § 23-5.1(a). Under no circumstances can correctional personnel impede or unreasonably delay a prisoner's access to medical care. *Id.* § 23-5.2.

59. LSOP, *supra* note 5, § 23-5.3(b)(iii) (if the most recent examination was more than a year before), a practice recommended in the discussion to ACA-ACI, *supra* note 10, § 2-4302.

60. LSOP, *supra* note 5, § 23-5.4; *see also* DOJ, *supra* note 11, §§ 5.38-.41; ACA-ACI, *supra* note 10, §§ 2-4318—4321. Confidentiality of records generally is dealt with in LSOP, *supra* note 5, § 23-6.11; *see* text accompanying notes 188-93 *infra*.

61. LSOP, *supra* note 5, § 23-5.5; *see also* DOJ, *supra* note 11, § 5.51; ACA-ACI, *supra* note 10, § 2-4313.

62. Prison administrators were held to be empowered to compel dialysis treatment for a prisoner whose refusal to undergo treatment was a protest to gain a transfer to a minimum security institution. Commissioner of Correction v. Myers, 399 N.E.2d 452 (Mass. 1979). Otherwise, there is probably no constitutional claim to order treatment for adults because they would be better off for it. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); Lang v. City of Des Moines, 294 N.W.2d 557 (Iowa 1980) (cannot force treatment for alcoholism during jail incarceration).

63. Healthy prisoners' constitutional rights are infringed if reasonable steps are not taken to safeguard them against communicable diseases of other inmates. Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974) (double-celling with known tubercular inmate); Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980) (failure to screen incoming jail inmates for communicable diseases); Hines v. Anderson, 439 F. Supp. 12, 23 (D. Minn. 1977) (inmates with contagious diseases to be segregated).

vent permanent and serious injury to the inmate-patient's health. A corollary to this is that inmates should not be made the subjects of *nontherapeutic* experimentation of any kind, even though ostensibly with informed, voluntary prisoner consent.[64] The *Standards*, however, recognize the existence of a somewhat more difficult problem if experimental *therapeutic* treatments are used with prisoners.[65] Presumably, private citizens can agree to participate for a fee or otherwise in any sort of experiment that is not immediately life-endangering and that otherwise is acceptable within medical and governmental guidelines. Prisoners, in contrast, are not allowed to agree to participate in nontherapeutic experiments because of a doubt that anyone confined or otherwise subjected to substantial governmental controls is free from inducements, subtle or otherwise, to consent. Under the *Standards*, however, prisoners can agree to participate in a therapeutic medical program not in general civilian use, as long as it has been approved as medically sound and in conformance with generally accepted medical standards,[66] and is based on voluntary and informed written consent.[67] Under such an approach, prisoners can consent to individualized treatment even though the treatment regimen is at the time in a somewhat preliminary or experimental phase and thus not routinely available to the general population. It must be stressed, however, that no apparently healthy prisoner can be allowed under the *Standards* to volunteer as a control.

Pharmaceuticals must be under strict control and supervision both to see that they are appropriately administered as medical treatment and to forestall illicit access. This is stressed in the *Standards*[68] as in counterpart statements of principle.[69] Ultimate responsibility for pharmaceuticals must lie with a physician in charge of institutional medical care, and only medical care staff should dispense prescription medications except in an emergency when custodial personnel may administer them at the direction of medically trained staff.[70]

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64. LSOP, *supra* note 5, § 23-5.8(a); DOJ, *supra* note 11, § 5.50; ACA-ACI, *supra* note 10, § 2-4314.

65. LSOP, *supra* note 5, 23-5.8(b)-(e); a substantially similar position is taken in DOJ, *supra* note 11, § 5.51 and Canadian Correctional Service, Guidelines Covering the Professional Conduct of Health Professionals in the CCS ¶ 25 (mimeo, current but undated).

66. LSOP, *supra* note 5, § 23-5.8(b)(i), (c) (based on review by a committee established by law to evaluate the program's medical validity). This procedure is required under federal regulations as well. 45 C.F.R. §§ 46.301-.306 (1980).

67. LSOP, *supra* note 5, § 23-5.8(d). Informed consent requires advance information of (a) the likely effects, including possible side effects, of a procedure; (b) the likelihood and degree of improvement, remission, control, or cure resulting from a procedure; (c) any uncertainty as to benefits or hazards of a procedure; (d) existing reasonable alternatives to a procedure; and (e) an ability on a prisoner's part to withdraw from a procedure or regimen at any time. *Id.* § 23-5.8(e). Written consents should be reviewed by an independent committee including prisoners and ex-offenders which interviews a participating prisoner personally, *id.*, § 23-5.8(d); specific judicial approval following an adversary hearing is required in instances of psychosurgery, electrical stimulation of the brain or adversive conditioning. *Id.* § 23-5.8(b)(iii).

68. LSOP, *supra* note 5, § 23-5.6.

69. Accreditation and inspection standards are in much greater detail than LSOP. DOJ, *supra* note 11, §§ 5.34-.37; ACA-ACI, *supra* note 10, § 2-4317. ACA-ACI, *supra* note 10, §§ 2-4306—4307 provide for detoxification programs for chemically dependent inmates.

70. LSOP, *supra* note 5, § 23-5.6 also contains a flat prohibition against administration of drugs by prisoners. *See also* note 53 *supra*.

E. *Religious Practices*

Prison inmates do not lose their rights as citizens to hold whatever religious beliefs they wish.[71] This constitutional right is restated in the *Standards*.[72] Difficulties arise in and out of prison, however, over the extent to which the practice or exercise of religion can be regulated or subjected to sanctions. Certainly, the free exercise clause of the first amendment[73] prohibits loss of livelihood based on practice of religious beliefs;[74] the basic issue in prisons is the extent to which a penal environment requires restrictions on religious practices, as opposed to beliefs, not valid in the free community. The position of the *Standards* is that any religious practice may be engaged in if consistent with orderly confinement and institutional security.[75]

Although one may question the logic of the position, courts have ruled that the first amendment establishment clause[76] is not violated through appointment of chaplains and religious counselors in prisons at public expense,[77] a principle which presumably extends to chapels, religious furnishings and other amenities. Nevertheless, the first amendment coupled with fourteenth amendment equal protection requires that there be no discrimination among religious groups, a principle restated in the *Standards*.[78]

As long as new religions were relatively rare phenomena in society they posed no special difficulties for prison administration. During the past generation, however, American correctional officials have been confronted by religious groups, formal recognition of which they resisted until forced to comply by the federal courts. Landmark decisions flowed from efforts by adherents of the Black Muslim (now World Community of Islam) movement to gain freedom of worship, diet, and dress in prisons; the status of that group as a recognized religion is clearly established today.[79] More recently,

71. Cruz v. Beto, 405 U.S. 319, 322 (1972); Cooper v. Pate, 378 U.S. 546 (1964).

72. LSOP, *supra* note 5, § 23-6.5(a), *and see id.* § 23-1.1 and text accompanying note 13 *supra*. *See also* DOJ, *supra* note 11, § 1.08; ACA-ACI, *supra* note 10, § 2-4336.

73. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

74. Thomas v. Review Bd., 101 S. Ct. 1425 (1981) (free exercise infringement when Jehovah's Witness was denied unemployment compensation after quitting because of an involuntary transfer to a foundry department producing tank turrets, and all other departments within the company also were engaged in weapons production); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment benefits could not be denied a worker discharged because she would not work on the sabbath); *cf.* Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing laws could be invoked against those whose religious beliefs required them to refrain from work on Saturday and who wanted to engage in business on Sundays in compensation). *See also* Frank v. State, 604 P.2d 1068 (Alaska 1979) (Athabascan Indian could not be convicted of violating game laws for killing moose out of season for use in religious potlatch ceremony).

75. LSOP, *supra* note 5, § 23-6.5(b). This restates the general principle of § 23-1.1; *see* text accompanying note 13 *supra*.

76. "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

77. Theriault v. Silber, 547 F.2d 1279 (5th Cir. 1977); *see also* Gittlemacker v. Prasse, 428 F.2d 1, 4 (3d Cir. 1970).

78. LSOP, *supra* note 5, §§ 23-6.5(h) (resources and facilities should be equitably allocated according to the proportion of prisoners adhering to each faith), -6.15 (no discriminatory treatment based solely on religion).

79. *See, e.g.*, Mukmuk v. Commissioner of Dep't of Correctional Services, 529 F.2d 272 (2d Cir.), *cert. denied*, 426 U.S. 911 (1976); Muhammad-D.C.C. v. Keve, 479 F. Supp. 1311 (D. Del. 1979); Bryant v. McGinnis, 463 F. Supp. 373 (W.D. N.Y. 1978).

a prison-generated religion, the Church of the New Song (CONS), has generated substantial litigation. What seemingly began as a frivolous effort to harass prison officials has gathered adherents both in and out of prisons and therefore has gained a limited measure of recognition.[80] Other religious groups involved in current legal controversies include a Christian-oriented homosexual entity, the Universal Fellowship of Metropolitan Community Churches,[81] the Native American Church,[82] and even satanism.[83] The Supreme Court is not generally receptive toward elaborate tests in light of which bona fide religious belief or status is to be ascertained.[84] Thus, accreditation standards have ceased essaying judgmental criteria for prison administrators.[85] For similar reasons, the ABA *Standards* eschew a black-letter definition of religion.[86]

Consistent with constitutional precedent, the *Standards* provide that prisoners should be allowed diets of nutritious food consonant with their religious beliefs and opportunities to observe special religious rites, including fasting and special dining hours on major holidays generally observed within their religion, subject to the usual concerns of institutional order and security.[87] Prisoners should also be allowed freedom to use of modes of dress or appearance, including religious medals and other symbols, as long as these do not interfere with identification and prisoner security.[88]

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80. Remmers v. Brewer, 529 F.2d 656 (8th Cir. 1976); Theriault v. Carlson, 495 F.2d 390 (5th Cir. 1974); *but see* Church of the New Song v. Establishment of Religion on Taxpayers' Money in the Federal Bureau of Prisons, 620 F.2d 648 (7th Cir. 1980) (res judicata applied to district court ruling in another circuit that CONS is not a bona fide religion).

81. Lipp v. Procunier, 395 F. Supp. 871 (N.D. Cal. 1975).

82. Battle v. Anderson, 457 F. Supp. 719, 733-34 (E.D. Okla. 1978) (holding not affected by subsequent appeals on procedural matters).

83. Kennedy v. Meacham, 540 F.2d 1057 (10th Cir. 1976) (district court should not have dismissed satanist prisoner's claims on pleadings; factual hearings required).

84. In Thomas v. Review Bd., 101 S. Ct. 1425, 1430 (1981), the Court noted that "determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task"; "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."

85. The first edition of ACA-ACI, *supra* note 10, § 4304 (discussion) and ACA-ALDF, *supra* note 10, § 5278 (discussion) admonished that "the number of persons who practice the religion, the newness of the religion or the absence from the religion of a concept of Supreme Being should be irrelevant in determining what constitutes legitimate religious practices." *See also* NAC CORRECTIONS, *supra* note 8, § 2.16. The current ACA-ACI, *supra* note 10, § 2-4462 discussion states only that "it is the responsibility of the institution to ensure that all inmates are able to voluntarily exercise their constitutional right to religious freedom when this freedom does not interfere with the order and security of the institution," the substantial equivalent to LSOP § 23-6.5(b). The discussion to DOJ, *supra* note 11, § 15.01 continues a standard that "[a] presumption of legitimacy attaches to newly formed religions, but the presumption may be rebutted by conduct which demonstrates that the religion is not authentic or that the religious group is not acting in good faith."

86. The Standing Committee thought it unnecessary to continue an admonition in the first tentative draft, LSOP (Tent. Draft No. 1), *supra* note 4, at 508, § 6.3(g), that such issues should be resolved by competent courts, not correctional authorities.

87. LSOP, *supra* note 5, § 23-6.5(c). Less direct reference to "facilities" and "symbols" is found in DOJ, *supra* note 11, § 15.01; ACA-ACI, *supra* note 10, § 2-4468 uses the formulation of "opportunities to adhere to the requirements of [prisoners'] . . . respective faiths." Representative constitutional precedent includes Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975); Aziz v. Le Fevre, 500 F. Supp. 725 (N.D. N.Y. 1980); Schlesinger v. Carlson, 489 F. Supp. 612 (M.D. Pa. 1980); Finney v. Mabry, 458 F. Supp. 720 (E.D. Ark. 1978).

88. LSOP, *supra* note 5, § 23-6.5(f); freedom of personal grooming generally also is stated

A corollary to freedom to engage in personal religious practices is freedom from pressure to participate in religious activities.[89] A greater problem in practice flows from routine solicitation and preservation of information about religious affiliation in prisoner files, because of its importance to administrative matters like issuance of passes to participate in scheduled religious activities, eligibility for special diets, and approval of requests for special visits by religious counselors. Maintaining such records throughout a period of incarceration does not violate the first amendment as long as prisoners have an avenue to change religious affiliation on the basis of whatever showing is reasonably required by correctional authorities.[90] However, active consideration by classification committees or paroling authorities of recorded participation in religious activities might well amount to a subtle yet substantial pressure to adhere, or to appear to adhere, to orthodox religious beliefs and practices. Hence, the ABA position is that only "directory" information, *i.e.*, an initial or amended indication of religious affiliation necessary to administrative activity, is to be retained concerning prisoner religious activities.[91]

The *Standards* embody the premise that all prisoners, even those under disciplinary and other special management, should have access to religious counseling, which appears to be a constitutional right.[92] Conversations with religious counselors, intended to be confidential, fall within a provision elsewhere in LSOP urging creation of an evidentiary privilege for all counselors covering information other than that about a contemplated crime, unless disclosure is required by court order.[93]

F. *Labor, Education, and Habilitation*

A history of exploitation of convict labor during the nineteenth century and antipathy on the part of the burgeoning labor union movement toward uncompensated or minimally compensated prison labor, generated almost universal state statutory prohibitions against prison enterprises not related

in § 23-6.8, subject to the general concerns of § 23-1.1. Constitutional decisions on the matter include St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980) (restrictions sustained as reasonable); Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975); Wright v. Raines, 457 F. Supp. 1082 (D. Kan. 1978); Maguire v. Wilkinson, 405 F. Supp. 637 (D. Conn. 1975).

89. LSOP, *supra* note 5, § 23-6.5(d); *see also* DOJ, *supra* note 11, § 1.08; ACA-ACI, *supra* note 10, § 2-4334. Prisoners cannot constitutionally be exposed to proselyting activities or be forced to attend religious services against their personal desire. Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980); *cf.* Aziz v. LeFevre, 500 F. Supp. 725 (N.D. N.Y. 1980) (not improper to ban organized religious activities in exercise area used by other prisoners).

90. An absolute refusal to allow notation of a change in affiliation might well violate the first amendment. Smith v. Blackledge, 451 F.2d 1201 (4th Cir. 1971). Individuals may be required to establish a bona fide belief in a religion, Ron v. Lennane, 445 F. Supp. 98 (D. Conn. 1977), subject to Supreme Court criteria laid down, *e.g.*, in Thomas v. Review Bd., 101 S. Ct. 1425 (1981); *see* note 84 *supra*.

91. LSOP, *supra* note 5, § 23-6.5(e).

92. *Id.* § 23-6.5(g). *See also* DOJ, *supra* note 11, §§ 15.01-.02; ACA-ACI, *supra* note 10, §§ 2-4465, -4469. *See, e.g.*, Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854, 863-64 (4th Cir. 1975); LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969); McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957).

93. LSOP, *supra* note 5, § 23-6.11(c).

directly to institutional maintenance (including production of foodstuffs) or to requirements of governmental agencies. Federal law today prevents state prison labor products from being shipped in interstate commerce.[94] This legislation swiftly eradicated the abuses which engendered it, but also produced questionable consequences: public needs could not justify full employment for large prison populations; to a constantly increasing extent, the skills (if any) acquired in prison industries had few applications to civilian industry, particularly when budgetary restraints precluded acquisition of "state of the art" machinery and equipment; and artificial pricing of goods for governmental and institutional use constituted a constant drain on correctional budgets to the detriment of habilitation programs viewed by penal administrators as more beneficial than prison industrial programs. These problems have been overcome through work-release and work-study programs sponsored by local or regional industries, though only to a limited extent, since they benefit only a relatively small number of younger prisoners.

Another significant factor has been a decline in the prestige of the rehabilitative principle. Prisons are increasingly thought of as places for punitive treatment designed to deter and for segregation from society through a fixed term. Consequently, prisoners should not be forced to participate in programs which will improve them, but only in activities relating to cleanliness and order, food service, maintenance, and production of goods for public use.[95] Nevertheless, whether habilitated or deterred, almost all prisoners return to communities where they must support themselves as an alternative to recidivating. There is increasing advocacy, therefore, of a reintroduction of private industry in prisons under conditions appropriate to forestall exploitation of prison labor for private gain.[96] It was against that background that the first tentative draft of the *Standards*[97] and, to a somewhat lesser extent, the fourth tentative draft[98] urged the aspirational goal that prisoners should have access to fully remunerative employment and receive substantially the same workers' benefits as their counterparts in free society. But prisoners should be required as well to pay costs and contributions like those to which

94. 18 U.S.C. § 1761(a) (1976); Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334 (1937); Wentworth v. Solem, 548 F.2d 773 (8th Cir. 1977). Federal prison industries are authorized by 18 U.S.C. §§ 4121-4128 (1976). *See generally* NAC CORRECTIONS, *supra* note 8, § 16.13; G. HAWKINS, THE PRISON, ch. 5 (1976); S. RUBIN, THE LAW OF CRIMINAL CORRECTION, 325-27 (2d ed. 1973).

95. LSOP, *supra* note 5, § 23-4.1; DOJ, *supra* note 11, § 1.10; *cf.* ACA-ACI, *supra* note 10, § 2-4334 (inmates must accept work assignments, enrollment in basic education programs, medical and dental care mandated by statute, and participation in other programs ordered by the sentencing court or required by statute).

96. Congress in 1976 added a new subsection (c) to 18 U.S.C. § 1761, *see* note 94 *supra*, allowing the Law Enforcement Assistance Administration (LEAA) to conduct up to seven pilot projects in which prisoners could receive full pay for industrial work, subject to a liability for deductions up to 80 percent of gross pay for deductions including federal and state taxes and fringe benefits, as well as a contribution of between 5 and 20 percent to a victim compensation fund. As of August 1981, LEAA had funded programs in Arizona, Kansas, and Minnesota. The remaining four projects are expected to be authorized by November 1981. Letter to author from George H. Bollinger, III, Acting Administrator, LEAA (August 26, 1981).

97. LSOP (Tent. Draft No. 1), *supra* note 4, at 458-65, §§ 4.1-.4 and commentary.

98. ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS §§ 23-4.2-.5 (Tent. Draft, No. 4, 1980).

free world workers are subject, including a reasonable sum to a corrections system to meet the costs of maintaining them. Because of substantial opposition to such a concept in the ABA House of Delegates, however, those sections and a counterpart section governing compensation for injuries or death[99] were withdrawn by the Standing Committee from House consideration and consequently do not form a part of the *Standards* as ultimately approved.

To recapitulate, the position of the *Standards* is that prisoners may be compelled to keep their quarters clean and to participate in other activities essential to institutional security and order, including cleaning, sanitation, food service, maintenance, and prison industries producing goods for government use.[100] Prisoners should expect no compensation for maintaining the cleanliness and orderliness of personal living quarters,[101] but should be given compensation for other work, properly performed, adequate to permit commissary purchases and to allow accumulation of limited funds toward release.[102] If prisoners want to participate in other programs and activities, including those which can contribute to self-improvement and education, they can and should be encouraged to do so, but are not to be compelled.[103] Although there is no specific mention of compensation for death or injury in the ultimate version of the *Standards*, prisoners have a claim to a healthful place in which to live[104] and to institutional compliance with industrial safety codes applicable to counterpart facilities in the free world.[105] Even if the *Standards* were silent on the matter, the constitutional case law is clear that prisoners must have a remedy for injuries sustained in unsafe prison work areas.[106]

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99. *Id.* § 23-6.12.

100. LSOP, *supra* note 5, § 23-4.1. Pretrial detainees should not be required to engage in programs or activities not related to institutional security and order. *Id.* § 23-4.1(a).

101. *Id.* § 23-4.1(a).

102. *Id.* § 23-4.1(b). Federal courts will not intervene to eliminate wage differentials among classes of prisoners. McCray v. Fauver, 28 CRIM. L. REP. (BNA) 2484 (D. N.J. 1981).

103. LSOP, *supra* note 5, § 23-4.2. Prisons are not bound under equal protection to provide work release programs in all institutions of the same category. Jamieson v. Robinson, 641 F.2d 138 (3d Cir. 1981). The MODEL ACT, *supra* note 9, §§ 4-701—706, recommends a voucher system under which prisoners may apply for or otherwise earn voucher credits to be used solely for the "purchase" of rehabilitation services. Some state prison systems also use a parole or performance contract plan under which prison residents can enter into agreements guaranteeing release by a fixed date if the contracting residents conform to all contract terms and attain all contract objectives which almost always are treatment oriented. *See, e.g.*, *id.* § 4-701 commentary; MICH. ADMIN. CODE R. 791.7725 (1977).

104. LSOP, *supra* note 5, § 23-6.9. *See also* Ramos v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981).

105. LSOP, *supra* note 5, § 23-6.14(a)(i).

106. *E.g.*, Haworth v. State, 60 Haw. 557, 592 P.2d 820 (1979); Green v. State Corrections Dep't, 386 Mich. 459, 192 N.W.2d 491 (1971); Reid v. New York State Dep't of Correctional Servs., 54 App. Div. 2d 83, 387 N.Y.S.2d 589 (1976). Federal prisoners have a claim to compensation under 18 U.S.C. § 4126 (1976); 28 C.F.R. §§ 301.1-.16 (1980); Sturgeon v. Federal Prison Indus., 608 F.2d 1153 (8th Cir. 1979) (prisoners first must exhaust administrative remedies, and Federal Tort Claims Act relief is not an alternate remedy); Berry v. Federal Prison Indus., 440 F. Supp. 1147 (N.D. Cal. 1977). Some states bring prisoners within a workers' compensation system. Meredith v. California Workers Compensation Appeals Bd., 19 Cal. 3d 777, 567 P.2d 746, 140 Cal. Rptr. 314, *cert. denied*, 434 U.S. 1064 (1977). Prisoners may be dismissed from industrial assignments because of failure to comply with applicable rules. McMath v. Alexander, 486 F. Supp. 156 (M.D. Tenn. 1980).

G. *External Contacts*

Communications to which prisoners are parties merit broad first amendment protection, in part because free members of society also are involved.[107] Therefore, as the *Standards* restate, limitations on prisoners' communication rights should be the least restrictive necessary to serve the legitimate interests of institutional order and security and protection of the public.[108] Prisoner communications tend to fall within certain clearly defined categories.

1. Courts

Prisoners, like citizens generally, must have untrammeled access to courts on all matters, criminal and civil.[109] Correctional authorities, therefore, are under a duty not only not to impede prisoner efforts to bring matters before the courts, but also to take reasonable steps to facilitate prisoner access to the judicial process. Thus, for example, prisoner work schedules cannot be set so that it is difficult or impossible for inmates to prepare needed documents or to engage in legal research.[110] Subject to reasonable regulations based on institutional safety and security, prisoners should be allowed to keep legal documents and materials in their cells.[111] Authorities also ought to see that prisoners have access to reasonable amounts of supplies in connection with litigation.[112] These judicially delineated rights are restated and to some extent elaborated upon in the *Standards*.[113]

The primary principle is that governmental authorities have a responsibility to assure free and meaningful access to the judicial process. Access must be without regard to whether an otherwise judicially cognizable issue relates to the legality of conviction or confinement, asserts legal rights against correctional or other governmental authorities, relates to civil legal problems, or amounts to a defense against prosecutions or actions in which

107. Procunier v. Martinez, 416 U.S. 396, 413-14 (1974).

108. LSOP, *supra* note 5, § 23-6.1(a). Constitutional doctrine seemingly allows restrictions on correspondence with other prisoners because no free citizen is affected by prison controls. Heft v. Carlson, 489 F.2d 268 (5th Cir. 1973); Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972); Thomas v. State, 285 Md. 458, 404 A.2d 257 (1979) (interprison mail can be examined and incriminating contents preserved as evidence). Prison authorities perhaps may establish lists of authorized correspondents for each prisoner. Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 210-12 (8th Cir. 1974). However, for such concepts to be invoked under LSOP § 23-6.1(a), a showing would be required that no less restrictive conditions are adequate to forestall an identified threat to institutional order and security.

109. Bounds v. Smith, 430 U.S. 817 (1977); *Ex parte* Hull, 312 U.S. 546 (1941); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981).

110. Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970); DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966); Jordan v. Johnson, 381 F. Supp. 600 (E.D. Mich. 1974), *aff'd*, 513 F.2d 631 (6th Cir. 1975).

111. Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975). *Cf.* Mahler v. Slattery, 489 F. Supp. 798 (E.D. Va. 1980) (prisoner engaged in 62 pending *pro se* cases had no right to keep 23 cartons of case files in his cell).

112. Access to a typewriter is not a constitutional right, however, because *pro se* prisoners are allowed to file handwritten petitions. Ramos v. Lamm, 485 F. Supp. 122, 166 (D. Colo. 1979), *modified on other grounds*, 629 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981).

113. LSOP, *supra* note 5, § 23-2.1. *See also* DOJ, *supra* note 11, §§ 1.03, 12.07; ACA-ACI, *supra* note 10, §§ 2-4022, -4323, -4378.

prisoners are respondents.[114] As a corollary to this principle, prison authorities cannot read, censor, or alter prisoner legal documents,[115] and cannot use a prisoner's decision to seek judicial relief to affect adversely program status within a correctional institution or opportunity for release.[116] Moreover, correctional authorities should allow prisoners a reasonable amount of free stationery and postage to communicate with courts,[117] and cannot intercept any communication reasonably anticipated to be directed to a court unless under court order or otherwise authorized by law.[118] If written communications to courts are not effective under the circumstances, free telephone contact with court officials should be permitted.[119] Prisoners should be allowed to prepare and retain legal documents subject only to reasonable regulations, dictated by considerations of institutional safety and scheduling, bearing on time, place and manner of preparation and circumstances of retention. The principle of least restrictive alternative is specifically advanced in this setting.[120]

The *Postconviction Remedies Standards*[121] urge a single and comprehensive remedial procedure which should have priority over other matters.[122] This is supported in LSOP, which calls for prompt resolution of disputes involving legality, duration, or conditions of confinement.[123]

2. Public Officials

The right to petition government officials for redress of grievances is a first amendment right.[124] It is restated and implemented in the *Standards*

114. LSOP, *supra* note 5, § 23-2.1(a), (b)(i).

115. *Id.* § 23-2.1(b)(v). *See also Ex parte* Hull, 312 U.S. 546 (1941); Guajardo v. Estelle, 580 F.2d 748, 757 (5th Cir. 1978).

116. LSOP, *supra* note 5, § 23-2.1(b)(vi). On unconstitutionality of discipline based on seeking judicial relief, see Leonardo v. Moran, 611 F.2d 397 (1st Cir. 1979) (but not established on facts); Mawhinney v. Henderson, 542 F.2d 1 (2d Cir. 1976); United States *ex rel.* Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964) (solitary confinement for seeking legal redress of grievances declared invalid). On other administrative sanctions against prisoner litigators, see, e.g., Hines v. Askew, 514 F.2d 673 (5th Cir. 1975) (allegations that prison authorities transferred a prisoner and withheld medicine from him because he filed a Federal Civil Rights Act claim stated a cause of action); Wren v. Carlson, 506 F.2d 131 (D.C. Cir. 1974) (prisoner subjected to harassment); Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972); Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967) (parole board regulations delaying consideration of parole if person engaged in litigation declared invalid).

117. LSOP, *supra* note 5, § 23-6.1(e). *See* Wickham v. Fisher, 629 P.2d 896 (Ut. 1981).

118. LSOP, *supra* note 5, § 23-6.1(d)(ii).

119. *Id.* § 23-6.1(f).

120. *Id.* §§ 23-2.1(b)(iv), 2.3(b); *cf.* ACA-ACI, *supra* note 10, § 2-4230 (access to legal materials by inmates in segregation).

121. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 1, ch. 22.

122. *Id.* §§ 22-1.1, -4.4.

123. LSOP, *supra* note 4, § 23-2.1(b)(ii). The standard recommends that administrative processes are presumptively unreasonable if not completed within 30 working days. It endorses the doctrine of exhaustion of remedies unless past practice or other facts demonstrate the futility of an available process.

124. Ramos v. Lamm, 639 F.2d 559, 582 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); Taylor v. Sterrett, 532 F.2d 462, 480-81 (5th Cir. 1976) (inspection for contraband, but no censorship of mail to and from officials); LeVier v. Woodson, 443 F.2d 360 (10th Cir. 1971) (refusal to transmit mail to public officials, if established, would violate Federal Civil Rights Act). In Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 130 n.6 (1977), the Court noted that inmates were not prevented from communicating grievances to correctional

through a prohibition against interception of communications to officials of the confining authority, state and local chief executive officers, and legislators and administrators of grievance systems.[125] The *Standards* confirm the right to circulate petitions for signature subject only to reasonable time and place limitations.[126]

3. Counsel

The sixth amendment right to counsel in criminal and quasi-criminal cases[127] carries with it the right of access to counsel during confinement so that counsel may prepare for a constitutionally competent presentation of a prisoner-client's case. Consequently, visual monitoring of attorney-client conferences has been held to be an unreasonable interference with confidential attorney-client communications protected by the sixth amendment.[128] The contents of communications to and from counsel cannot be read but can be visually inspected for presence of contraband.[129] It is proper, however, to require attorneys to confirm beforehand to prison authorities the existence of an attorney-client relationship and to identify specific communications as coming from them.[130] Prison authorities are prohibited from defining providers of legal assistance by, for example, refusing to allow law student interns or legal assistants employed by lawyers to interview prisoners in connection with litigation.[131]

Under the *Standards*, prisoners have the same liberty to retain and consult private counsel on all legal matters as private citizens do.[132] Correspondence and other communications between attorneys and prisoner-clients are

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authorities: "With this presumably effective path available for the transmission of grievances, the fact that the Union's grievance procedures might be more 'desirable' does not convert the prohibitory regulations into unconstitutional acts."

125. LSOP, *supra* note 5, § 23-6.1(d)(ii). Reasonable amounts of stationery and free postage should be available for the purpose. *Id.* § 23-6.1(e). Visits with public officials should not be counted against visiting periods and should be unlimited except as to time and duration. *Id.* § 23-6.2(e). *See also* DOJ, *supra* note 11, § 12.07; ACA-ACI, *supra* note 10, § 2-4378.

126. LSOP, *supra* note 5, § 23-6.6(b), but prisoners cannot practice intimidation against other prisoners or persons in the process. This does not extend to a right to strike or take other concerted action to affect institutional conditions, programs, or policies, *id.* § 23-6.6(c), which conforms to current Supreme Court doctrine. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).

127. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); scope of the right on appeal is covered by Ross v. Moffitt, 417 U.S. 600 (1974).

128. Case v. Andrews, 226 Kan. 786, 603 P.2d 623 (1979). *Cf.* State *ex rel.* McCamic v. McCoy, 276 S.E.2d 534 (W. Va. 1981) (pat-down search of lawyers improper unless institution could show factual basis indicating attorneys create a security danger).

129. Wolff v. McDonnell, 418 U.S. 539, 576-77 (1974); Henry v. Perrin, 609 F.2d 1010 (1st Cir. 1979), *cert. denied*, 445 U.S. 963 (1980); Wycoff v. Brewer, 572 F.2d 1260 (8th Cir. 1978); Crowe v. Leeke, 550 F.2d 184 (4th Cir. 1977).

130. Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978).

131. Procunier v. Martinez, 416 U.S. 396 (1974). *Cf.* Perkins v. Wagner, 513 F. Supp. 904 (E.D. Pa. 1981) (authorities had to allow visits with codefendant wife as long as necessary to establish a coordinated and adequate defense, subject to appropriate institutional security arrangements).

132. LSOP, *supra* note 5, § 23-2.2(c). For the scope of assistance to prisoners in the context of administrative and other hearings within the correctional system, *see* text accompanying notes 277-78, 291-92 *infra*.

subject to interception only pursuant to court order or as otherwise authorized by law.[133] Visits with attorneys should be free from limitations other than as to time and duration and should not count against established visiting periods for family and friends.[134]

A troubling issue has been provision by inmates of assistance to other prisoners in the preparation of legal documents. The potential in such a practice for exploitation of some prisoners by others is evident. Nevertheless, the Supreme Court has held that *if* prison administrators do not make available or facilitate access to more professionally qualified sources of legal assistance, they cannot punish or otherwise interfere unreasonably with inmates who provide uncompensated assistance in legal matters.[135]

Access to adequate legal materials relates to representation by counsel in that, as a constitutional matter, if competent legal assistance is not made available to prisoners, prisons must provide them with basic legal research materials.[136] The *Standards* take a "both-and" position on the matter. Correctional authorities should make educational services available even to prisoners who have access to legal services, either through special printed materials or through a collection of standard legal reference materials bearing on criminal law and procedure and cognate constitutional issues.[137]

4. Correspondence Generally

Because communications rights of nonprisoners are affected directly, the Supreme Court has ruled that censorship or other controls on correspondence cannot be exercised unless prison officials meet a burden of showing that their impositions advance "one or more of the substantial governmental interests of security, order, and rehabilitation" and are no broader or stricter than required for the purpose.[138] Under that constitutional standard, as indicated earlier, correspondence with legal counsel cannot be read but can

133. LSOP, *supra* note 5, § 23-6.1(d)(i). Indigent prisoners should be allowed reasonable amounts of stationery and postage for the purpose, *id.* § 23-6.1 (e), and access to free telephone services for calls to attorneys in connection with current litigation if correctional authorities determine that written communications are ineffective under the circumstances. *Id.* § 23-6.1(f). *See also* DOJ, *supra* note 11, § 12.07; ACA-ACI, *supra* note 10, §§ 2-4338, -4378.

134. LSOP, *supra* note 5, § 23-6.2(e). *See* Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); State *ex rel.* McCamic v. McCoy, 276 S.E.2d 534 (W. Va. 1981), both eliminating restrictions on time and duration of counsel interviews. Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), held that preconviction detainees subject to transfer to a distant state penitentiary where they could not readily contact counsel and witnesses had a claim to an administrative pretransfer hearing.

135. Johnson v. Avery, 393 U.S. 483 (1969). For a discussion of alternative delivery modes see Bounds v. Smith, 430 U.S. 817, 831-32 (1977). Authorities can confiscate a check sent by one prisoner to another in payment for such services. Henderson v. Ricketts, 499 F. Supp. 1066 (D. Colo. (1980).

136. Bounds v. Smith, 430 U.S. 817 (1977) (dimensions of a minimum law collection are described at 819 n.4); Jensen v. Satran, 303 N.W.2d 568 (N.D. 1981). The obligation to provide state legal materials to a state prisoner transferred to federal custody in another state rests on federal, not transferring state, officials. Goodnow v. Perrin, 421 A.2d 1008 (N.H. 1980).

137. LSOP, *supra* note 5, § 23-2.3(a). *See also* DOJ, *supra* note 11, § 1.05; ACA-ACI, *supra* note 10, § 2-4326.

138. Procunier v. Martinez, 416 U.S. 396, 413-14 (1974). Interception and copying letters for purposes of a criminal investigation unrelated to institutional security considerations violated federal and state constitutional rights. State v. Sheriff, 619 P.2d 181 (Mont. 1980).

only be inspected for contraband.[139] Nor can correspondence with religious counselors or functionaries be limited unreasonably.[140] Correspondence among prison inmates, however, may be barred or regulated,[141] and authorities may proscribe libelous or obscene contents[142] or material which clearly is inflammatory and subversive of institutional discipline.[143]

The *Standards* provide that envelopes, packages, or containers sent to or from prisoners may be opened and inspected to determine if they contain contraband, with the limitation that communications reasonably anticipated to be between prisoners and their counsel may be opened and inspected only in an affected prisoner's presence.[144] Written communications are not to be read and oral communications intentionally overheard unless prison administrators have received reliable information that a particular communication may jeopardize public safety or the security or safety within a correctional institution, or is being used to further illegal activity.[145] If communications are directed to counsel or specified persons or organizations like courts, officials of the confining authority, state and local chief executive officers, legislators, grievance system administrators, and paroling authorities, there can be no interception without a court order or specific authorization by law.[146]

The era of closely controlling printed matter ordered or received by prisoners has largely drawn to a close. The position of the *Standards* is that limitations can be imposed on printed materials which otherwise can be mailed lawfully[147] only if bottomed on the overriding considerations embodied in section 23-1.1.[148] The latter are broad enough to comprehend the "publishers only" limitation on casebound books sustained by the Supreme

139. *See* note 129 *supra*.

140. Cruz v. Beto, 405 U.S. 319 (1972) (listed a prohibition against correspondence with a Buddhist counselor as an element of improper interference with first amendment rights).

141. *See* note 108 *supra*.

142. Carpenter v. South Dakota, 536 F.2d 759 (8th Cir. 1976), *cert. denied*, 431 U.S. 931 (1977); Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976).

143. Wilson v. Prasse, 463 F.2d 109, 113 (3d Cir. 1972) (as long as authorities were not motivated by racial or religious prejudice in evaluating material).

144. LSOP, *supra* note 5, § 23-6.1(b); the proviso was added by amendment during House of Delegates consideration. *See also* DOJ, *supra* note 11, § 12.05; ACA-ACI, *supra* note 10, §§ 2-4338, -4370, -4375-77.

145. LSOP, *supra* note 5, § 23-6.1(c); note 264 *infra*. *See also* DOJ, *supra* note 11, §§ 12.05-.06; ACA-ACI, *supra* note 10, § 2-4375 and discussion.

146. LSOP, *supra* note 5, § 23-6.1(d). On provision of a reasonable amount of free stationery and postage to help indigent prisoners maintain ties with family and friends in the community, *see* § 23-6.1(e); DOJ, *supra* note 11, § 12.08 (but reasonable limitations on postage allowance may be imposed on inmates who abuse an unlimited postage allowance policy); ACA-ACI, *supra* note 10, § 2-4371. There may be a constitutional dimension to this. Secretary v. Allen, 286 Md. 133, 406 A.2d 104 (1979) (evidentiary hearing required on lawfulness of limitation to seven paid first-class letters weekly). Under LSOP, *supra* note 5, § 23-6.1(f) pay telephones should be available to inmates, a position also taken in DOJ, *supra* note 11, § 12.10 and ACA-ACI, *supra* note 10, § 2-4379, but free calls for indigents are allowed only for communications with attorneys of record and officials of courts in which their current litigation is pending.

147. LSOP, *supra* note 5, § 23-6.1(g); *see also* DOJ, *supra* note 11, § 12.01; ACA-ACI, *supra* note 10, § 2-4373. Libelous or obscene matter is not mailable. *See* note 142 *supra*.

148. *See* text accompanying note 13 *supra*. *Cf.* DOJ, *supra* note 11, § 12.02 (no publication is rejected solely because its content is religious, philosophical, political, social, or sexual, or because its content is unpopular or repugnant).

Court,[149] as well as subject matter which might facilitate assaults or escapes.[150] Refusal to forward or deliver material presumably is a proper subject for grievance proceedings covering all forms of prisoner complaints.[151]

5. Visitation

Almost all prison inmates eventually return to the free community. Therefore, it is important to preserve as many family and community ties as possible to encourage swift reintegration into society following release. In many instances today this is accomplished through assignment to community corrections centers and work or study release programs in which controls are minimal.[152] The *Standards* recommend use of home furlough programs to the extent they are consistent with community and institutional security.[153]

Nevertheless, for most prisoners a more important practical concern is visitation at correctional facilities by family members and friends. Although it has been implied that long-term prisoners cannot be denied visits if such a deprivation will be detrimental to physical or mental health,[154] the more relevant constitutional standard appears to be that there is no absolute right to visits.[155] Consequently, reasonable limitations can be imposed on contacts with casual acquaintances,[156] smuggling of weapons and contraband

149. Bell v. Wolfish, 441 U.S. 520, 548-53 (1979), embodied in DOJ, *supra* note 11, § 12.02. *See also* Vodicka v. Phelps, 624 F.2d 569 (5th Cir. 1980); Trapnell v. Riggsby, 622 F.2d 290 (7th Cir. 1980) (sustaining requirement that nude and seminude photographs come from commercial sources, not persons well known to prisoner); Rich v. Luther, 514 F. Supp. 481 (W.D. N.C. 1981); *In re* Smith, 112 Cal. App. 3d 956, 169 Cal. Rptr. 564 (1980).

150. *Cf.* MICH. ADMIN. CODE R. 791.6603(3) (1977); MICH. DEP'T OF CORRECTIONS DIR. PD-DWA-64.03 (Feb. 1, 1976), restricting specific information about manufacturing weapons, explosives, incendiary devices, poisons or dangerous drugs; clearly inflammatory writings including but not limited to advocacy of disorder, violence or insurrection against correctional facilities or personnel; material describing or showing acts of homosexuality, sadism, violent sexual practice or unlawful sexual behavior; and detailed instruction in martial arts including judo, karate, aikido, kung fu and similar techniques.

151. LSOP, *supra* note 5, § 23-7.1(b)-(c). Procunier v. Martinez, 416 U.S. 396 (1974), required hearings before correspondence can be interrupted. This has been invoked in the setting of control over incoming publications. Hopkins v. Collins, 547 F.2d 503 (5th Cir. 1977).

152. *See* NAC CORRECTIONS, *supra* note 8, §§ 9.9, 16.14.

153. LSOP, *supra* note 5, § 23-6.2(a); *see also* DOJ, *supra* note 11, § 12.16; ACA-ACI, *supra* note 10, §§ 2-4387, -4419, -4455.

154. Campbell v. McGruder, 580 F.2d 521, 546-48 (D.C. Cir. 1978) (pretrial detention facility).

155. [I]nstitutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on . . . visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded latitude."

Pell v. Procunier, 417 U.S. 817, 826 (1974). Racial discrimination in according visitation privileges denies equal protection. Thomas v. Brierley, 481 F.2d 660 (3d Cir. 1973). On visitation restrictions affecting death row inmates, *see* Wilson v. Nevada Dep't of Prisons, 511 F. Supp. 750 (D. Nev. 1981).

156. Lynott v. Henderson, 610 F.2d 340 (5th Cir. 1980) (authorities could bar visits by women under circumstances suggesting their relationship to prisoner was not conducive to rehabilitation); Hamilton v. Saxbe, 428 F. Supp. 1101, 1111-12 (N.D. Ga. 1976), *aff'd sub nom.* Hamilton v. Bell, 551 F.2d 1056 (5th Cir. 1977). There is obviously no protected claim of access to consenting sexual partners from among prisoners of the opposite sex, Dodson v. State, 268 Ind.

can be forestalled through reasonable security measures,[157] and visitor attire can be subjected to reasonable restrictions.[158] There is no right to conjugal visits,[159] although some authorities intimate that contact visits may be a protected right at least for preadjudication detainees.[160]

The *Standards* adopt a position consonant with current precedent that visits should be encouraged, subject to overriding concerns of institutional and public safety and order, through provision of reasonable visiting hours, including weekend and holiday times, for the convenience of visitors.[161] No specific mention is made of conjugal visits, but it is recommended that extended visits between prisoners and their families in suitable accommodations should be allowed those not on home furlough status,[162] which, in the exercise of administrative discretion, could accomplish the equivalent to conjugal visitation. Visiting facilities should be informal and should allow opportunities for physical contact.[163] Under such circumstances, however, visitors may be subjected to nonintrusive forms of personal search.[164] A preference is expressed for minimum visits of one hour each, with a possibility of cumulating time allotments to facilitate longer visits.[165] This is important when family members must travel long distances to visit a prisoner. Prisoners in disciplinary segregation should have the same visitation rights as

667, 377 N.E.2d 1365 (1978), or of the same sex, People v. Coulter, 94 Mich. App. 531, 288 N.W.2d 448 (1980) (no constitutional violation in invoking sodomy statute against prisoners).

157. Magnetometers and like detection devices can be used in public buildings generally, McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978), which presumably would extend to prison facilities; hand-carried items also are subject to visual inspection. United States v. Kelley, 393 F. Supp. 755 (W.D. Okla. 1975); State v. Colby, 263 S.C. 468, 210 S.E.2d 914 (1975). On submission to strip searches as a condition to visitation, *see* Wool v. Hogan, 505 F. Supp. 928 (D. Vt. 1981) (strip search requirement for visitor suspected of carrying contraband not unreasonable when metal detectors could not detect contraband like drugs carried beneath clothing); *In re* French, 106 Cal. App. 3d 74, 164 Cal. Rptr. 800 (1980) (could not suspend visiting privileges of five women who refused strip searches not shown to be reasonably related to institutional security). Before visitors can be subjected to other forms of search and seizure, adequate legal grounds must exist independent of the fact they are visitors—stop-and-frisk or personal search following a legal arrest being the most usual. State v. Custodio, 607 P.2d 1048 (Haw. 1980) (strip search reasonable); State v. Hall, 292 N.W.2d 749 (Minn. 1980).

158. Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978) (female visitors could be required to wear suitable garments).

159. McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975). *See also* n.156 *supra*. It was held unreasonable to deny contact visits between preconviction detainees and their young children when suitable facilities were available to accommodate such visits. *In re* Smith, 112 Cal. App. 3d 956, 169 Cal. Rptr. 564 (1980).

160. Rhem v. Malcolm, 507 F.2d 333, 337 (2d Cir. 1974); Cooper v. Morin, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979), *cert. denied*, 446 U.S. 984 (1980); Wickham v. Fisher, 629 P.2d 896 (Ut. 1981); *contra*, Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981); Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979); Feeley v. Sampson, 570 F.2d 364, 373 (1st Cir. 1978). On a need to show that protracted denial of contact visits likely will affect physical or mental health, *see* Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978).

161. LSOP, *supra* note 5, § 23-6.2(b), cross-referencing § 23-1.1. *See also* DOJ, *supra* note 11, § 12.12; ACA-ACI, *supra* note 10, §§ 2-4380-81, -4385.

162. LSOP, *supra* note 5, § 23-6.2(c); *see also* DOJ, *supra* note 11, § 12.13; ACA-ACI, *supra* note 10, § 2-4384.

163. LSOP, *supra* note 5, § 23-6.2(c); *see also* DOJ, *supra* note 11, § 12.12; ACA-ACI, *supra* note 10, § 2-4383.

164. LSOP, *supra* note 5, § 23-6.2(d); *see also* ACA-ACI, *supra* note 10, § 2-4382.

165. LSOP, *supra* note 5, § 23-6.2(e). Visits with counsel, clergy and public officials are not to count against visiting periods and should be unlimited in number.

those in the general prison population, subject only to considerations of institutional security and order.[166]

Although for the most part prisoners should be allowed to receive whomever they wish, subject to frequency limitations and scheduling requirements, the *Standards* recognize that correctional authorities may disqualify for good cause certain people as visitors.[167] Examples include abuse of visitation regulations on earlier occasions[168] and reasonable suspicion that criminal activity may ensue.[169] Exclusion of visitors is subject to prisoner grievance proceedings.[170]

Many if not most American prisons are remote from metropolitan centers from which the bulk of their inmates are sentenced. Regardless of whether or not this poses a constitutional issue,[171] prison administrators should do whatever they can to facilitate visits by providing local transportation and furnishing information about transportation alternatives.[172]

6. Visits by Media Representatives and Groups

It is implicit if not express in American constitutional decisions that the right of prisoners to communicate with members of the public generally carries with it a right to contact the press and other communications media.[173] It is doubtful that the first amendment supports a direct claim by communications media representatives to initiate interviews with prisoners whom they select,[174] although an absolute ban on access to penal facilities by the media and public might produce a constitutional infringement.[175] The *Standards* endorse a position that correctional authorities should accommodate media and public group requests to visit correctional institutions, provided visits are conducted so as to safeguard the privacy and dignity of inmates and

166. *Id.* § 23-6.3; *see also* DOJ, *supra* note 11, § 12.14; ACA-ACI, *supra* note 10, §§ 2-4227, -4381.

167. LSOP, *supra* note 5, § 23-6.2(d); *see also* DOJ, *supra* note 11, § 12.12; ACA-ACI, *supra* note 10, § 2-4381 (discussion).

168. *See* Patterson v. Walters, 363 F. Supp. 486 (W.D. Pa. 1973) (wife earlier had passed controlled substance to inmate husband).

169. Rowland v. Wolff, 336 F. Supp. 257 (D. Neb. 1971) (sister and sister-in-law believed to have smuggled in pistol and ammunition later discovered in prison chapel).

170. LSOP, *supra* note 5, § 23-6.2(d). In Rowland v. Wolff, 336 F. Supp. 257 (D. Neb. 1971), the court accepted as sufficient an administrative inquiry which concluded that female relatives in fact had introduced a weapon into the facility, even though it had not been discovered in the inmate relative's possession).

171. *See* Ali v. Gibson, 631 F.2d 1126 (3d Cir. 1980), *cert. denied*, 449 U.S. 1129 (1981) (reversing district court order voiding assignment to mainland federal prison making it very difficult for family members to visit him); Goodnow v. Perrin, 421 A.2d 1008 (N.H. 1980) (burdensome transfer to federal institution in another state, rendering it difficult to manage family visits, was not cruel and unusual punishment).

172. LSOP, *supra* note 5, § 23-6.2(f); DOJ, *supra* note 11, § 12.15; ACA-ACI, *supra* note 10, §§ 2-4385 (discussion), -4386.

173. Pell v. Procunier, 417 U.S. 817 (1974), in disallowing a press claim to interview selected inmates, noted the availability of communications and visitations between prisoners and press representatives. Decisions indicating such a prisoner right to exist include Main Road v. Aytch, 565 F.2d 54 (3d Cir. 1977); Taylor v. Sterrett, 532 F.2d 462, 481-82 (5th Cir. 1976); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).

174. Pell v. Procunier, 417 U.S. 817 (1974).

175. Houchins v. KQED, Inc., 438 U.S. 1 (1978), contains dicta from which such a conclusion may be inferred.

promote institutional security and order.[176] Conversations conducted under such circumstances should be monitored only under emergency circumstances.[177]

H. *Miscellaneous Claims or Rights*

1. Prisoner Publications

The first amendment does not guarantee prisoners freedom to publish intramural newspapers and the like,[178] although administrators may well consider that a helpful step toward maintaining inmate morale. If prisoner publications are allowed, regulations controlling them are presumed valid.[179] Some courts have ruled that administrative due process governs official censorship of contents,[180] while others are satisfied with a more informal consultative approach.[181] Contents improper in incoming publications, if proposed for internal dissemination,[182] should be subject to censorship as a reasonable exercise of power in the interests of institutional security and discipline.[183]

The ABA position is that newspapers and other communications media by and for prisoners should be encouraged within limits of resources and facilities.[184] The expectation is that prisoners themselves must bear the costs, although naturally no bar is intended to use of public funds and facilities for the purpose. Advance review of content is appropriate so that persons or groups under attack can be given a contemporaneous opportunity to reply,[185] and material can be excised which is not within first amendment protection or otherwise not publishable because it constitutes a substantial threat to institutional security.[186] Objections to administrative interference with prisoner communications media should be lodged under grievance ma-

176. LSOP, *supra* note 5, § 23-6.4; *see also* DOJ, *supra* note 11, § 1.14; ACA-ACI, *supra* note 10, § 2-4339.

177. The provision cross-refers to § 23-6.1(c)-(d), which requires reliable information that a particular communication may jeopardize public safety or institutional security or safety, or is being used in furtherance of illegal activity; if counsel or certain public authorities participate, a court order or authorization by law is necessary. *See* text accompanying notes 144-45 *supra*, 262 *infra*.

178. The Luparar v. Stoneman, 382 F. Supp. 495 (D. Vt. 1974), *appeal dismissed*, 517 F.2d 1395 (1975).

179. Pittman v. Hutto, 594 F.2d 407 (4th Cir. 1979).

180. Spates v. Manson, 644 F.2d 80 (D. Conn. 1981) (officials must make factual showing of substantial risk of violence or disorder to censor article in prison newspaper); The Luparar v. Stoneman, 382 F. Supp. 495 (D. Vt. 1974); Laaman v. Hancock, 351 F. Supp. 1265 (D. N.H. 1972).

181. Pittman v. Hutto, 448 F. Supp. 61 (E.D. Va. 1978), *aff'd*, 594 F.2d 407 (4th Cir. 1979).

182. *See* notes 141-42, 150 *supra*.

183. Vodicka v. Phelps, 624 F.2d 569 (5th Cir. 1980); Blue v. Hogan, 553 F.2d 960 (5th Cir. 1977). This is the standard governing censorship of correspondence. Procunier v. Martinez, 416 U.S. 396 (1974).

184. LSOP, *supra* note 5, § 23-6.7(a). *See also* MODEL ACT, *supra* note 9, § 4-124; NAC CORRECTIONS, *supra* note 8, § 2.15; ACA-ACI, *supra* note 10, § 2-4459 (activities generally initiated by inmates under staff supervision).

185. To the extent prison broadcasting stations are subject to FCC regulations an opportunity for reply probably is necessary. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

186. LSOP, *supra* note 5, § 23-6.7(b).

chinery provided for elsewhere in the *Standards*.[187]

2. Confidentiality of Prisoner Records

The ABA is concerned,[188] as are accrediting organs,[189] that prisoner records and other institutional data compilations specific enough to enable individual prisoners to be identified be held confidential unless: (a) a prisoner concerned consents; (b) the disclosure is made to an official or agency requesting in writing that the material be available in connection with a criminal investigation; (c) the material is solicited for statistical, research or reporting purposes in a form adequate to forestall identifying particulars concerning individual prisoners; or (d) disclosure is required by a valid court order. The *Standards* also endorse a claim by prisoners to have access to their files to inspect and copy information as long as it does not constitute diagnostic opinion which might seriously disrupt a program of rehabilitation,[190] reveal sources of information obtained under a promise of confidentiality,[191] create a possibility of physical or other harm to any other person, or jeopardize prison security if disclosed.[192] Prisoners believing that information in their files or prison records to which they have been given access is inaccurate should be allowed to request its amendment.[193]

3. Voting

The fourteenth amendment by its terms permits states to forfeit the right of convicted felons to vote.[194] Preconviction detainees not under a

187. *Id.* §§ 23-6.7(c), -7.1. *See* text accompanying notes 210-26 *infra*.

188. LSOP, *supra* note 5, § 23-6.11(a).

189. DOJ, *supra* note 11, § 21.18; ACA-ACI, *supra* note 10, §§ 2-4120, -4125-26; ACA-ACA, *supra* note 10, §§ 73, 78.

190. *Cf.* decisions creating a psychotherapists' privilege against revealing information critical to a confidential therapeutic relationship. Allred v. State, 554 P.2d 411 (Alaska 1976); *In re* "B", 482 Pa. 471, 394 A.2d 419 (1978). The *Standards* urge a privilege for all information given by prisoners to correctional employees serving in a counseling relationship unless the information bears on a contemplated crime or disclosure is required by court order. LSOP, *supra* note 5, § 23-6.11(c).

191. *Cf.* a similar restriction under the Freedom of Information Act, 5 U.S.C. § 552. *Id.* § 552(b)(7)(D) states:

> (b) This section does not apply to matters that are:
>
> * * *
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source. . . .

See Nix v. United States, 572 F.2d 998 (4th Cir. 1978).

192. LSOP, *supra* note 5, § 23-6.11. *See also* DOJ, *supra* note 11, § 21.19; ACA-ACI, *supra* note 10, § 2-4123.

193. LSOP, *supra* note 5, § 23-6.11(b). A prisoner has a constitutional right to clear a file of material concerning affiliation with a political movement. Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980) (Black Liberation Army).

194. Richardson v. Ramirez, 418 U.S. 24 (1974). Arbitrary legislative classifications, however, can deny equal protection. Hobson v. Pow, 434 F. Supp. 362 (N.D. Ala. 1977) (equal protection was denied when men convicted of battering their wives were disfranchised but not wives similarly convicted of assaulting husbands); *cf.* Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) (no equal protection problem in allowing successful

valid felony conviction must, however, be given opportunities for absentee registration and voting.[195] Nevertheless, whatever the federal constitutional doctrine, the position of the ABA is that conviction should not work a deprivation of the franchise, whether through automatic operation of law or the action or inaction of governmental officials.[196] The *Standards* recognize a practical political problem which can result if convicted felons are allowed both to retain the vote and to establish voting residence in the locale of their incarceration. A large voting prisoner population in a rural county might well assert a controlling leverage in local government. Accordingly, prisoners should not be authorized to establish a voting domicile solely on the basis of physical presence in an institution, but instead should be allowed absentee voting rights in the place of their residence at time of conviction and incarceration.[197]

4. Prisoner Organizations

Prisoners have absolute freedom to believe as they will[198] and to express their beliefs in writing to others.[199] They have no absolute right to form prisoner organizations and to engage in collective activity directed against prison administrations.[200] Nor can they insist on opportunities to participate in activities of outside organizations not unreasonably viewed by correctional authorities as inimical to prisoner rehabilitation or institutional discipline and order.[201]

The ABA standard[202] adopts a somewhat more liberal stance than con-

state probationers to regain franchise while not extending the same benefit to successful federal probationers resident in the state).

195. O'Brien v. Skinner, 414 U.S. 524 (1974); *see* Goosby v. Osser, 409 U.S. 512 (1973); *cf.* Tate v. Collins, 496 F. Supp. 205 (W.D. Tenn. 1980).

196. LSOP, *supra* note 5, § 23-8.4.

197. *Id.* This is the position taken by some state courts. Dane v. Board of Registrars, 374 Mass. 152, 371 N.E.2d 1358 (1978); Emery v. State, 177 Mont. 73, 580 P.2d 445 (1978), *cert. denied*, 439 U.S. 874 (1979).

198. Jones v. Prisoners' Labor Union, 433 U.S. 119, 136 (1977); Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980).

199. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 404 U.S. 1049 (1972). Correspondence and internal publications advocating prisoners' rights and criticizing prison officials cannot be censored or banned. Guajardo v. Estelle, 580 F.2d 748, 760-61 (5th Cir. 1978); United States *ex rel.* Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975).

200. Jones v. Prisoners' Labor Union, 433 U.S. 119, 132 (1977). Prison authorities can ban meetings by groups until the latter have been given official recognition. Preast v. Cox, 628 F.2d 292 (4th Cir. 1980).

201. Jones v. Prisoners' Labor Union, 433 U.S. 119, at 136. The Court noted, however, the desirability of contacts with outside organizations and individuals who may aid prisoner rehabilitation and postrelease reintegration in society. In contrast, the California Supreme Court has ruled that although prison union meetings can be prohibited in the reasonable interests of institutional security, *In re* Price, 25 Cal. 3d 448, 600 P.2d 1330, 158 Cal. Rptr. 873 (1979), state legislation guaranteeing civil rights to prisoners forestalls a blanket ban against prisoner union buttons worn by inmates, *In re* Reynolds, 25 Cal. 3d 131, 599 P.2d 86, 157 Cal. Rptr. 892 (1979), or correspondence from a paroled union officer to incarcerated union members. *In re* Brandt, 25 Cal. 3d 136, 599 P.2d 89, 157 Cal. Rptr. 894 (1979). It is not a first amendment violation to allow volunteers from religious groups to visit jail inmates as long as their preaching is not forced on uninterested inmates. Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980).

202. LSOP, *supra* note 5, § 23-6.6(a). *See also* DOJ, *supra* note 11, § 1.13; ACA-ACI, *supra* note 10, § 2-4338. Subsection (b) covers the right of petition; *see* text accompanying notes 124-26 *supra*.

stitutional precedent requires, in that it encourages lawful organizations and their activities within prison confines, subject to considerations of public safety and institutional security and order.[203] The position is clear, however, that the ABA does *not* endorse a right on the part of prisoners to strike or to take other concerted action to affect institutional conditions, programs or policies.[204]

5. Personal Privacy

The ABA endorses a standard of privacy of living quarters for prisoners, consistent with their security classification,[205] and freedom from sexual discrimination.[206] These provisions must be administered against the statutory background of federal legislation forbidding sex-based discrimination and requiring bona fide occupational qualifications for assignments based on gender.[207] Prisoner privacy cannot, therefore, be accomplished through a ban against assignments of staff members to custodial supervision of inmates of the opposite sex,[208] but instead must rest on special training on supervising prisoners of the opposite sex as well as specialized assignments within broad employment categories.[209]

I. *Grievance Procedures*

Although it is not clear that due process requires a grievance mechanism to resolve prisoner complaints,[210] establishment of formal grievance procedures by legislative or administrative action[211] is most advantageous to courts and administrators because thereafter a failure of prisoners to invoke them means they have not exhausted available administrative remedies. Exhaustion of administrative remedies is a prerequisite to federal habeas

203. *E.g.*, guards can be stationed at religious meetings. United States *ex rel.* Jones v. Rundle, 453 F.2d 147 (3d Cir. 1971); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967). Participation by nonprisoners should be encouraged. LSOP, *supra* note 5, § 23-6.6(a). *See also* DOJ, *supra* note 11, § 19.01; ACA-ACI, *supra* note 10, §§ 2-4455-56.

204. LSOP, *supra* note 5, §§ 23-4.2, -6.6(c).

205. *Id.* § 23-6.14(b).

206. *Id.* § 23-6.15.

207. Civil Rights Act of 1964, § 104b, 42 U.S.C. § 2000e-3(b) (1975). See Dothard v. Rawlinson, 433 U.S. 321 (1977), on qualifications for employment as a correctional officer.

208. Forts v. Ward, 621 F.2d 1210 (2d Cir. 1980); Gunther v. Iowa State Men's Reform., 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

209. Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981).

210. Some federal courts have incorporated such proceedings in comprehensive orders administering state prisons or prison systems based on the Federal Civil Rights Act. *See, e.g.*, Taylor v. Perini, 455 F. Supp. 1241, 1252 (N.D. Ohio 1978), *modified*, 477 F. Supp. 1289 (N.D. Ohio 1979); Laaman v. Helgemoe, 437 F. Supp. 269 (D. N.H. 1977). The first amendment right of petition includes a right to file complaints with prison administrators, Stovall v. Bennett, 471 F. Supp. 1286, 1290 (M.D. Ala. 1979), but does not cover group petitions which, in the reasonable thinking of prison officials, may jeopardize institutional security. Nickens v. White, 622 F.2d 967 (8th Cir.), *cert. denied*, 449 U.S. 1018 (1980); *In re* Price, 25 Cal. 3d 448, 600 P.2d 1330, 158 Cal. Rptr. 873 (1979).

211. Recently established federal procedures are contained in 28 C.F.R. §§ 542.10-16 (1980); *see* 44 Fed. Reg. 62248-51 (1979). *See also* LSOP (Tent. Draft No. 1), *supra* note 4, at 579-82, commentary.

corpus,[212] damage actions based directly on the eighth amendment,[213] actions under the Federal Civil Rights Act,[214] contempt actions alleging failure to comply with federal district court regulatory orders,[215] or state appellate review of administrative activity.[216] Grievance procedures also may generate a comprehensive record reducing the scope of or eliminating the need for federal district court hearings.[217] Although every effort should be made to resolve prisoner grievances informally as far as possible,[218] the ABA urges the adoption of grievance procedures to resolve complaints concerning institutional policies, rules, practices and procedures.[219] These procedures should not serve as devices to review specific dispositions on the merits by internal adjudicative bodies like parole, classification and disciplinary boards.[220] The intent of the *Standards* is that the latter determinations be reviewable through normal administrative review mechanisms established under a state administrative procedures act.[221]

To facilitate and standardize grievance procedures, special forms should be provided so that grievants may note briefly the nature of their complaints, the administrators involved and the remedy sought.[222] The essentials of a fair grievance proceeding are recapitulated in the *Standards*:[223] (a) a written response to each grievance containing reasons for the decision; (b) reasonable time limits within which a response must be given;[224] (c) advisory review of grievances; and (d) a method of resolving jurisdictional issues. Grievances should be possible over a broad array of issues,[225] and prisoners should have adequate assurances against reprisals based on grievance filings.[226]

Correctional administration within an institution should be subject to

212. Antonelli v. Ralston, 609 F.2d 340 (8th Cir. 1979) (federal prisoner); Mason v. Ciccone, 531 F.2d 867 (8th Cir. 1976) (requirement does not serve to suspend the writ).

213. Brice v. Day, 604 F.2d 664 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980).

214. 42 U.S.C. §§ 1983-85 (1976); Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). This applies to actions under 28 U.S.C. § 1331 (1976) as well. Miller v. Stanmore, 636 F.2d 986 (5th Cir. 1981).

215. Taylor v. Perini, 455 F. Supp. 1241 (N.D. Ohio 1978), *modified*, 477 F. Supp. 1289 (N.D. Ohio 1979).

216. *In re* Dexter, 25 Cal. 3d 921, 603 P.2d 35, 160 Cal. Rptr. 118 (1979); Dickerson v. Warden of Marquette Prison, 99 Mich. App. 630, 298 N.W.2d 841 (1980).

217. Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978).

218. LSOP, *supra* note 5, § 23-7.1(a).

219. *Id.* § 23-7.1(b). *See also* DOJ, *supra* note 11, § 1.11; ACA-ACI, *supra* note 10, §§ 2-4343. Staff and inmates should participate in the design of grievance procedures. LSOP, *supra* note 5, § 23-7.1(d)(v).

220. LSOP, *supra* note 5, § 23-7.1(b).

221. *Id.* § 23-7.2(a). *See also* Frazee v. Iowa Bd. of Parole, 248 N.W.2d 80 (Iowa 1976) (parole revocation); Lawrence v. Michigan Dep't of Corrections, 88 Mich. App. 167, 276 N.W.2d 554 (1979) (major misconduct cases are "contested cases" reviewable in designated trial courts under the state act); *contra*, Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976) (major disciplinary proceeding in federal prison system).

222. LSOP, *supra* note 5, § 23-7.1(c). Use of standard forms may be made a condition to availability of a grievance procedure. Mahler v. Slattery, 489 F. Supp. 798 (E.D. Va. 1980).

223. LSOP, *supra* note 5, § 23-7.1(d).

224. A recommended period is 30 working days; a failure to respond within that period should be taken as a denial of relief. *Id.* § 23-7.1(d)(ii). A different response time may be necessary in emergencies. *Id.* § 23-7.1(d)(iii).

225. *Id.* § 23-7.1(d)(vii).

226. *Id.* § 23-7.1(d)(vi).

inspection by administrative authorities at the departmental level who act outside institutional staff structure and usual channels of management control.[227] The approved edition of the *Standards* does not advocate establishment of the office of a special correctional ombudsman or mediator as did the first tentative draft.[228] If such a functionary is established, however, oversight jurisdiction should extend to receipt and investigation of prisoner complaints.[229]

II. CONTROL AND DISCIPLINE OF PRISONERS

A. *Use of Force*

Incarceration inevitably requires the use of force to maintain discipline, security and order. Consequently, prison administrations should develop detailed policies governing use of all levels of force and provide for their periodic documented review and revision.[230] There are certain legal limitations in light of which institutional policies must be administered. Prison administrators cannot use force of any kind, including chemical sprays and the like,[231] for purposes of punishment because that would violate the eighth amendment ban against cruel and unusual punishment.[232] A basic principle is that no more force may be used than is reasonably necessary to cope with the particular circumstances.[233] Nondeadly physical force is the standard. Chemical devices are not to be used routinely and affected prisoners must be given immediate physical examinations and medical treatment.[234] Deadly force, according to principles applied to law enforcement officers generally,[235] may be used only in necessary defense of prison personnel, in-

227. *Id.* § 23-7.3(a). High-level departmental oversight is necessary even though other state agencies have investigating or reporting authority on the pattern of the federal General Accounting Office. *Id.* § 23-7.3 and commentary.

228. *See* LSOP (Tent. Draft No. 1), *supra* note 4, at 574-78; MODEL ACT, *supra* note 9, § 4-201 and comment. It is, however, ABA policy that such systems ought to be established, a policy which did not require restatement in the *Standards*. *See* 96 ABA REPORTS 541-42 (1971); 94 ABA REPORTS 119-21 (1969).

229. LSOP, *supra* note 5, § 23-7.3(b).

230. *Id.* § 23-6.12. More detailed guidelines than those in LSOP may be found, *e.g.*, in DOJ, *supra* note 11, §§ 6.17-.33, 21.08-.09; ACA-ACI, *supra* note 10, §§ 2-4096-98, -4185-91.

231. Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981); Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979); McCargo v. Mister, 462 F. Supp. 813, 819 (D. Md. 1978); Donahue v. Maynard, 437 F. Supp. 47 (D. Kan. 1977). Institutions are not required constitutionally, however, to issue regulations governing MACE and tear gas use. LeBlanc v. Foti, 487 F. Supp. 272 (E.D. La. 1980).

232. Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); Harrah v. Leverette, 271 S.E.2d 322 (W. Va. 1980); State *ex rel.* K.W. & C.W. v. Werner, 242 S.E.2d 907 (W. Va. 1978). However, an isolated attack by a guard is not punishment under the eighth amendment; the latter requires action for a penal or disciplinary purpose authorized by a higher prison authority. George v. Evans, 620 F.2d 495 (5th Cir. 1980); Harrah v. Leverette, 271 S.E.2d 322 (W. Va. 1980).

233. Necessary physical contacts by custodial officers are privileged. Picariello v. Fenton, 491 F. Supp. 1026 (M.D. Pa. 1980).

234. Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980) (power to use force against individual prisoners is more limited than to quell general disturbances).

235. Qualls v. Parrish, 534 F.2d 690 (6th Cir. 1976); Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975). Excessive force constitutes a Federal Civil Rights Act violation. Russ v. Ratliff, 538 F.2d 799 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); Kyle v. City of New Orleans, 353 So. 2d 969 (La. 1977).

mates or other persons or in forestalling escape. In actual or threatened emergencies, inmates can be physically confined to quarters until institutional order is assured.[236] Personal restraints like handcuffs, irons and straitjackets are to be used only if necessary to prevent individual prisoners from escaping during transfer or injuring themselves or others.[237]

The *Standards* essentially restate these principles.[238] In particular, instances should be minimized in which physical or life-endangering force need be invoked.[239] Deadly force[240] can be used to prevent escape from facilities used primarily to house felony convicts unless the employee using that force actually knows either that the escaping person has not been charged with or convicted of a felony involving violence, or that the escapee is unlikely to endanger human life or inflict serious bodily harm on someone if not prevented from escaping. If an institution houses misdemeanants or preconviction detainees, deadly force necessary to forestall escape can be used only if the user of the force knows there is a substantial risk that the escaping individual will cause death or serious bodily harm unless prevented from escaping, or believes in the exercise of on-site professional judgment that lesser force would fail or endanger other lives.[241] Deadly force cannot be used to prevent destruction of property or maintain institutional security unless there is an independent basis in the law of the jurisdiction governing self-defense or defense of others.[242] Whenever force of any sort is used, correctional administrators should require reports which should be promptly reviewed for factual sufficiency, supplemented by additional factual investigations if needed.[243]

B. *Search and Seizure*

Imprisoned persons have a much reduced scope of constitutional protection against various forms of search and seizure, compared to citizens in free society, because of supervening considerations of institutional security and order and a need to prevent introduction of contraband substances into a

236. Saunders v. Packel, 436 F. Supp. 618 (E.D. Pa. 1977).

237. Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980); Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979); Picariello v. Fenton, 491 F. Supp. 1026 (M.D. Pa. 1980). Drugs should never be used as a restraining mechanism for security purposes. DOJ, *supra* note 11, § 6.18.

No due process administrative hearing is required to "lock down" a penal institution for several months after a period of rioting. Hayward v. Procunier, 629 F.2d 599 (9th Cir. 1980).

238. LSOP, *supra* note 5, § 23-6.12(a). A corollary is that an appropriate array of control devices and weapons should be provided within an institution, *id.* § 23-6.12(b), and regularly inspected, *id.* § 23-6.12(c); care should be exercised in the assignment of staff to positions in which force, including deadly force, may have to be used, and proper entry and ongoing education must be provided for and participated in by persons receiving such assignments. *Id.*

239. *Id.* § 23-6.12(a)(i).

240. Deadly force is defined to include "force that a trained and authorized professional employee uses with the purpose of causing, or which he or she knows will create a substantial risk of causing, death or serious bodily harm." *Id.* § 23-6.12(a)(iii).

241. *Id.* § 23-6.12(a)(ii)(A)(2). Note that what is contemplated is a good-faith subjective evaluation by the correctional employee concerned, not an objective reasonable person standard as in orthodox criminal law.

242. *Id.* § 23-6.12(a)(ii)(B). Unreasonable interpretations of circumstances would render correctional employees criminally liable if death or physical injury of a prisoner or another ensued. *See* MODEL PENAL CODE §§ 3.04 (P.O.D. 1962), 210.4 (1981).

243. LSOP, *supra* note 5, § 23-6.12(d).

prison setting.[244] Therefore, there is no requirement that advance judicial authorization be obtained before prisoner living quarters can be searched, or sanitation or safety inspections conducted. Nor does the fourth amendment require that prisoners be physically present during search of living quarters or personal property.[245]

The *Standards* expand the constitutional minima in some respects. No special authorization of any sort is required for searches of areas of an institution other than prisoner living quarters,[246] and routine periodic visual inspection of prisoner living areas can be undertaken by correctional authorities, without specific advance authorization, to confirm compliance with health, safety and security regulations.[247] Both routine and random shakedown inspections can be conducted without a special underlying cause but should be authorized in advance by the chief or acting chief executive of an institution.[248] If, however, an intrusive living quarters search is neither routine nor random, but is focused on an individual, the ABA recommends advance written authorization by a supervisor of the employees carrying out the search, based on a reasonable belief that contraband[249] or other prohibited material will be found.[250] Immediate search can be made if a correctional officer reasonably believes material which is sought would be disposed of while the otherwise necessary prior approval is obtained.[251] All searches of prisoner quarters and possessions should be conducted so that damage to property and invasion of privacy are kept to a minimum.[252] Written reports should be prepared concerning all searches for which advance authorization

244. Bell v. Wolfish, 441 U.S. 520 (1979); United States v. Ready, 574 F.2d 1009 (10th Cir. 1978); United States v. Stumes, 549 F.2d 831 (8th Cir. 1977); Hudson v. State, 196 Colo. 211, 585 P.2d 580 (1978); State v. Dauzat, 364 So. 2d 1000 (La. 1978); Thomas v. State, 285 Md. 458, 404 A.2d 257 (1979). Guards searching for weapons and contraband after a riot acted improperly in seizing and reading an inmate's diary, since they had no reasonable expectation of finding evidence there about prisoner participation in the riot. DiGiuseppe v. Ward, 514 F. Supp. 503 (S.D. N.Y. 1981). On the status of property of prisoners on work release status, *compare* State v. Nunziato, 178 N.J. Super. 216, 428 A.2d 564 (1981) (work release supervisor properly could conduct warrantless search of defendant's home, where he had permission to go for lunch, because defendant was like prisoner rather than parolee), *with* Commonwealth v. Gabrielle, 409 A.2d 1173 (Pa. Super. Ct. 1979) (locker at place of work release employment not subject to warrantless search).

245. Bell v. Wolfish, 441 U.S. 520, 557 (1979).

246. LSOP, *supra* note 5, § 23-6.10(a).

247. *Id.* § 23-6.10(b).

248. *Id.* § 23-6.10(c).

249. The *Standards* do not define contraband in this context and other contexts like inspection of correspondence under § 23-6.1. The Supreme Court used a formulation of "money, drugs, weapons, and other contraband," Bell v. Wolfish, 441 U.S. 520, 559 (1979), and state courts have approved and applied statutory definitions like "any tool or other thing that may be used to facilitate [escape] or any other thing which a person confined in official custody is prohibited by statute or regulation from making or possessing," ME. REV. STAT. tit. 17-A, § 756 (Supp. 1977); State v. Bishop, 392 A.2d 20 (Me. 1978), and "any article or thing which a person confined . . . is prohibited by statute, rule, regulation or order from obtaining or possessing, and whose use would endanger the safety or security of such institution or any person therein." OR. REV. STAT. § 162.135(1) (1977); State v. Meyer, 283 Or. 449, 583 P.2d 553 (1978).

250. LSOP, *supra* note 5, § 23-6.10(d).

251. *Id.*, proviso.

252. *Id.* § 23-6.10(e). Intentional or negligent deprivation of prisoner property does not violate the fourteenth amendment unless it is accomplished without due process of law, which is not the case as far as the Federal Civil Rights Act is concerned unless there is no state tort remedy available to prisoners. Parratt v. Taylor, 101 S. Ct. 1908 (1981).

is required or which result in seizure of contraband or other forbidden material. If property is taken, a copy of the report or a portion of it should be given an affected prisoner as a receipt.[253]

Physical searches of prisoners are indispensable in many situations, for example, following transportation outside institutional confines or contact visits. The Supreme Court found no constitutional infringement in visual inspections of body cavities following contact visits,[254] although there might be an infringement of personal privacy if searches of that sort are not conducted in private by custodial officers of the same sex.[255] The *Standards* urge detailed regulation of physical searches through institutional rules. Nonintrusive sensors instead of body searches should be used whenever possible.[256] Pat-down searches, however, are appropriate to determine whether prisoners are carrying contraband or other prohibited material.[257] Strip searches and visual inspections of body cavities ought to rest on articulable suspicion that a prisoner is carrying contraband, etc.[258] Digital or instrumental inspection of anal or vaginal cavities should be authorized in a written document from the chief executive officer of an institution embodying a factual basis supporting a reasonable belief that the prisoner in question is secreting contraband or other prohibited material there.[259] The recommendations concerning written reports and receipts apply in this setting also.[260]

The monitoring of oral communications must rest on reliable information that a particular communication may jeopardize the safety of the public or the safety or security of a correctional institution, or is being used to further illegal activity.[261] There may, however, be a statutory bar to monitoring telephone conversations without the express permission of one of the parties to the conversation or a valid court order.[262]

253. LSOP, *supra* note 5, § 23-6.10(g). No receipt is required by the Constitution, however. Thornton v. Redman, 435 F. Supp. 876 (D. Del. 1977).

254. Bell v. Wolfish, 441 U.S. 520, 558 (1979). In Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980), the court expressed concern over strip searches of prisoners in administrative segregation before and after noncontact visits.

255. Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981). *Cf.* Lee v. Downs, 470 F. Supp. 188 (E.D. Va. 1979) (male custodial officers controlling strong female prisoner while her clothing was removed did not act unreasonably under the circumstances).

256. LSOP, *supra* note 5, § 23-6.10(f)(i).

257. *Id.* § 23-6.10(f)(ii).

258. *Id.* § 23-6.10(f)(iii). Such searches should be conducted by a supervisor in a private place out of the sight of others, except that the prisoner may request the presence of another available officer of the institution. Sims v. Brierton, 500 F. Supp. 813 (N.D. Ill. 1980), held it improper to require a prisoner to submit to anal cavity inspections after visits with a law student intern aiding him in preparing a deposition, in the absence of a showing of abuse of regulations by such interns.

259. LSOP, *supra* note 5, § 23-6.10(f)(iv). Such searches should be conducted by a medically trained person, other than another prisoner, in the prison hospital or another private place; a prisoner may request the presence of another available officer of the institution. Medically-trained personnel may object to being used for security rather than therapeutic purposes, so that an institution may have to train custodial staff members in the necessary techniques. *See* DOJ, *supra* note 11, § 6.13 (discussion).

260. LSOP, *supra* note 5, § 23-6.10(g); *see* note 253 *supra*.

261. LSOP, *supra* note 5, § 23-6.1(c); more stringent limitations govern communications with counsel and public officials. *Id.* § 23-6.1(d).

262. Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979); *contra*, United States v. Paul, 614 F.2d 115 (6th Cir.), *cert. denied*, 446 U.S. 941 (1980) (distinguishing *Walonis* on the basis it was

C. *Disciplinary Rules and Their Enforcement*

Penal statutes provide insufficient criteria for operation of prisons. Detailed rules and regulations are required incorporating sanctions for disobedience. There are two dimensions to this: norms must be made known to those regulated by them, as correctional officials cannot condemn without prior notice what they find improper;[263] and regulations must be specific enough that inmates know what is prohibited.[264] Sanctions also should be precise for each infraction.

The *Standards* urge correctional administrators to promulgate clear, written rules governing prisoner conduct.[265] Clarity requires a specific definition of offenses, schedules of minimum and maximum sanctions applicable to each infraction, and specific criteria for disciplinary and classification systems. In particular, a principle of parsimony in sanctioning is advocated: the least severe punishment appropriate to each infraction is all that should be imposed.[266] It is essential that all prisoners receive personal notice of rules and sanctions in a language they can understand, upon entry into an institution. Supplementary oral explanations should be given if needed.[267]

More legal problems have arisen from enforcement than from promulgation of disciplinary rules. Misconduct which also amounts to a crime poses an especially sensitive problem. Prison discipline is not criminal punishment, so double jeopardy does not bar pursuit of both administrative discipline and criminal prosecution.[268] Nevertheless, investigative acts by prison authorities, if violative of the fourth, fifth or sixth amendment, can render evidence inadmissible and thus frustrate prosecution. There also is a self-incrimination problem under such circumstances. Although prison hearing officers and boards may consider adversely to prisoners a failure to

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not shown there that the monitoring was related to prison security); Rodriguez v. Blaedow, 497 F. Supp. 558 (E.D. Wis. 1980) (prison officials could require all calls to be conducted in English so that they could monitor calls, *citing* Christman v. Skinner, 468 F.2d 723 (2d Cir. 1972) (approving monitoring of nontelephonic conversations)); People v. Myles, 62 Ill. App. 3d 931, 379 N.E.2d 897 (1978).

263. *See* State *ex rel.* Gillespie v. Kendrick, 265 S.E.2d 537 (W. Va. 1980) (must publish jail rules according to which infractions are determined and sanctioned).

264. *See* Fichtner v. Iowa State Penitentiary, 285 N.W.2d 751, 759 (Iowa 1979) (prison rules must be intelligible); *cf.* Procunier v. Martinez, 416 U.S. 396 (1974) (Court invalidated mail regulations forbidding statements that "magnify grievances," "unduly complain" or "belittle th[e] staff or our judicial system or anything connected with [the] Department of Corrections," or which contain "disrespectful comments" or "derogatory remarks").

265. LSOP, *supra* note 5, § 23-3.1. *See also* DOJ, *supra* note 11, § 10.01; ACA-ACI, *supra* note 10, § 2-4345. The first tentative draft of the *Standards* called for active prisoner participation in rule-making. LSOP (Tent. Draft No. 1), *supra* note 4, at 572-73). The approved version, however, goes no further than to endorse promulgation of disciplinary and other rules through procedures established under an administrative procedure act, LSOP, *supra* note 5, § 23-7.2(a); prisoners should be given notice of rules, *id.* § 23-7.2(b), which in practice means under a state act they will have an opportunity to submit objections or proposed changes before final rule adoption.

266. LSOP, *supra* note 5, § 23-3.1(a)(i). A similar standard of proportionality appears in DOJ, *supra* note 11, § 10.01.

267. LSOP, *supra* note 5, § 23-3.1(b). *See also* DOJ, *supra* note 11, § 10.02; ACA-ACI, *supra* note 10, §§ 2-4346, -4395. Institution personnel also must be conversant with rules, their rationale and available sanctions. DOJ, *supra* note 11, § 10.03; ACA-ACI, *supra* note 10, § 2-4347.

268. Rusher v. Arnold, 550 F.2d 896 (3d Cir. 1977); Pruitt v. State, 266 S.E.2d 779 (S.C.), *cert. denied*, 449 U.S. 1036 (1980).

refute data showing a violation,[269] statements exacted from prisoners at official instance are compelled and cannot be used by the prosecution during subsequent criminal proceedings (other than perhaps for impeachment).[270] Accordingly, although prosecuting officers legally cannot forbid prison administrators from investigating and punishing independently criminal infractions of prison disciplinary rules, the *Standards* endorse the principle that prison administrators should take the initiative of laying such matters before local prosecutors so that a prompt joint determination can be made on whether or how to proceed.[271] In the interim, prisoners who may be or have been prosecuted criminally can be confined to quarters or transferred to a higher security classification.[272]

Disciplinary proceedings, at least those which may result in loss or forfeiture of good time credits and thus prolong confinement,[273] are subject to several federal constitutional requirements. First, "advance written notice of the claimed violation"[274] is required. Second, there must be a hearing at which a prisoner respondent may "call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[275] Reasonable limits may be placed on this claim to prevent repetitive statements or to safeguard against a risk of reprisal or an undermining of authority. Such a hearing, however, is not intended to be adversary in the same sense as a criminal proceeding, so that prisoners have no right to confront sources of adverse data, and prison authorities need not justify to a prisoner respondent their decision not to summon a particular witness.[276]

The Supreme Court refused to require representation by legal counsel in such hearings. However, in instances of illiterate inmates or matters

269. Baxter v. Palmigiano, 425 U.S. 308 (1976).

270. Garrity v. New Jersey, 385 U.S. 493 (1967); McCracken v. Corey, 612 P.2d 990 (Alaska 1980); *cf.* United States v. Garcia, 625 F.2d 162 (7th Cir. 1980), *cert. denied*, 449 U.S. 923 (1980) (trial of prison inmates may make it imperative to shield identity of informers during pretrial proceedings).

271. LSOP, *supra* note 5, § 23-3.3(a). *See also* DOJ, *supra* note 11, § 10.07; ACA-ACI, *supra* note 10, § 2-4344. Prosecutors should reach a charging decision promptly; in the interim, correctional authorities should exercise care in continuing internal investigations and disciplinary action lest the rights of public and the right of the prisoner to a fair criminal trial be infringed. There is no responsibility, however, to suspend disciplinary proceedings.

272. LSOP, *supra* note 5, § 23-3.3(b). A ninety-day maximum period for special handling is recommended before formal charges are filed; after charging, special status may continue until a criminal proceeding is concluded. After disposition of criminal charges, prisoners may be reclassified and, if disciplinary proceedings were suspended during criminal proceedings, administrative action may continue. *Id.* § 23-3.3(c).

273. Wolff v. McDonnell, 418 U.S. 39 (1974); Williams v. Davis, 386 So. 2d 415 (Ala. 1980). *McDonnell* applies to procedures resulting in loss of parole eligibility, State *ex rel.* Meeks v. Gagnon, 95 Wis. 2d 115, 289 N.W.2d 357 (Wis. App. 1980), and assignment to disciplinary confinement, Parker v. Cook, 642 F.2d 865 (5th Cir. 1981).

274. Wolff v. McDonnell, 418 U.S. at 563.

275. *Id.* at 566; Williams v. Davis, 386 So. 2d 415 (Ala. 1980); Cruz v. Oregon State Penitentiary, 48 Or. App. 473, 617 P.2d 644 (1980) (or officials can take witness request as a request for an administrative investigation of prisoner allegations); State *ex rel.* Irby v. Israel, 95 Wis. 2d 697, 291 N.W.2d 643 (Wis. App. 1980). Prisoners have been held to have a claim to discovery of exculpatory materials by analogy to United States v. Agurs, 427 U.S. 97 (1976), and Brady v. Maryland, 373 U.S. 83 (1963). Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981).

276. Baxter v. Palmigiano, 425 U.S. 308, 322-23 (1976).

presenting complex issues on which an inmate, unaided, probably could not collect and present data necessary for an adequate comprehension of the case, there can be a claim to aid from another inmate or, if that is not allowed, to adequate substitute assistance "in the form of help from the staff or from a sufficiently competent inmate designated by the staff."[277] This is so even though the alleged misconduct also is criminal and the right to counsel will attach in the course of ensuing criminal proceedings.[278]

Decision makers must be independent of the officials or employees responsible for bringing charges.[279] An adjudicator must prepare "a written statement . . . as to the evidence relied upon and the reasons for the disciplinary action taken."[280] In an unusual situation, certain data may be omitted from findings because of a concern for individual or institutional safety, but if this is done an adjudicator should "indicate the fact of the omission" in the findings.[281] Judicial review is not constitutionally required.[282]

For the most part, the ABA *Standards* rest on this constitutional law. They continue to differentiate between hearings for minor and major infractions, not essaying a black-letter test to distinguish them.[283] Other standards-generating bodies have abandoned the distinction because of the practical administrative problems it presents.[284] All disciplinary hearings require written notice within a recommended seventy-two hours after an incident, followed within a recommended twenty-four additional hours by service of copies of any other written data a tribunal may consider.[285] Hearings should ensue within a recommended three days after notice.[286] Respondents have the right to be present and to speak in personal defense;[287] they also have the right to a written decision based on a preponderance of the evidence, specifying reasons, promptly and in no event later than a recommended five days after hearings.[288] Further review by the chief executive

277. Wolff v. McDonnell, 418 U.S. at 570.

278. Baxter v. Palmigiano, 425 U.S. at 315.

279. Vitek v. Jones, 445 U.S. 480, 495 (1980) (transfer of mentally-ill prisoners; disciplinary procedure summarized and applied by analogy); Piccirillo v. Wainwright, 382 So. 2d 743 (Fla. Dist. Ct. App. 1980); Harrah v. Leverette, 271 S.E.2d 322 (W. Va. 1980).

280. Wolff v. McDonnell, 418 U.S. at 563.

281. *Id.* at 565.

282. Riner v. Raines, 409 N.E.2d 575 (Ind. 1980).

283. LSOP, *supra* note 5, § 23-3.2 *passim*. This builds on the federal constitutional doctrines described in text accompanying notes 273-76 *supra*. No test is attempted because courts make their own *ad hoc* determinations whether *McDonnell et al.* govern. McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

284. DOJ, *supra* note 11, ch. 10; ACA-ACI, *supra* note 10, at 91 (introductory note). Minor matters should be resolved informally if at all possible. DOJ, *supra* note 11, § 10.04; ACA-ACI, *supra* note 10, § 2-4349.

285. LSOP, *supra* note 5, § 23-3.2(a)(i), (b). *See also* DOJ, *supra* note 11, §§ 10.05, .08-.11; ACA-ACI, *supra* note 10, §§ 2-4351, -4357, -4359. Special prehearing detention is dealt with in LSOP, *supra* note 5, § 23-3.2(e); DOJ, *supra* note 11, §§ 10.12-.13; ACA-ACI, *supra* note 10, § 2-4353.

286. LSOP, *supra* note 5, § 23-3.2(a)(ii), (b). *See also* DOJ, *supra* note 11, § 10.12; ACA-ACI, *supra* note 10, § 2-4359.

287. LSOP, *supra* note 5, § 23-3.2(a)(iii), (b). DOJ, *supra* note 11, § 10.14 and ACA-ACI, *supra* note 10, § 2-4360 contemplate the same right unless respondent behavior justifies exclusion (or under DOJ the right is waived in writing).

288. LSOP, *supra* note 5, § 23-3.2(a)(iv), (b). *See also* DOJ, *supra* note 11, § 10.17; ACA-ACI, *supra* note 10, §§ 2-4364-65.

officer of the institution then should be available to an adjudicated respondent within a relatively short period.[289] All adjudicators must be impartial.[290]

The *Standards* incorporate the essence of the *McDonnell* representation test.[291] Prisoner respondents should have access to legal advice and counseling in advance of hearings governing the length of imprisonment, but should have no guaranteed right to representation by legal counsel during such hearings.[292]

In major disciplinary hearings respondents may request the attendance of anyone in the "local prison community" with relevant information and may examine or cross-examine such a person, subject only to limitation if the data sought are cumulative. A respondent may be excluded during witness examination if the physical safety of a person would be endangered by the presence of a particular witness or a disclosure of the witness's identity.[293] If disciplinary charges are not confirmed after hearings, all references to the charges and their aftermath must be physically removed from files and the fact they were brought cannot be used adversely to a prisoner in any way.[294]

III. CIVIL DISABILITIES

Part VIII of the *Legal Status of Prisoners Standards* covers civil disabilities, a topic which might well have been lodged in the context of the *Sentencing Alternatives and Procedures Standards*,[295] but was not. The ABA endorses a basic policy that, with rare exceptions, all laws or regulations subjecting convicted persons to collateral disabilities or penalties, or deprivation of civil rights, should be repealed.[296] To the extent such collateral consequences of convictions remain in force, no individual should be subjected to them unless an administrative hearing is held beforehand to establish that they are necessary to advance an important governmental or public interest.[297] Disabilities should be imposed only for fixed periods, at the expiration of which an affected citizen should have a claim to reconsideration of the appropriateness of the penalty or disability.[298] In either event, the burden should rest on

289. LSOP, *supra* note 5, § 23-3.2(a)(v); appeal should be lodged within a recommended five days and resolved within 30, and enforcement of sanctions should be suspended during appeal unless individual safety or security otherwise will be affected adversely. *See also* DOJ, *supra* note 11, § 10.19; ACA-ACI, *supra* note 10, § 2-4368 (and § 2-4366, calling for routine review by wardens of all hearings and sanctions to assure conformity with policy and regulations).

290. LSOP, *supra* note 5, § 23-3.2(c). *See also* DOJ, *supra* note 11, § 10.09; ACA-ACI, *supra* note 10, § 2-4361; note 279 *supra*.

291. *See* text accompanying notes 277-78 *supra*.

292. LSOP, *supra* note 5, § 23-3.2(a)(iii), commentary and proviso. Both DOJ, *supra* note 11, § 10.16 and ACA-ACI, *supra* note 10, § 2-4362 contemplate assistance by staff members selected by prisoner respondents.

293. LSOP, *supra* note 5, § 23-3.2(b). *See also* DOJ, *supra* note 11, § 10.15; ACA-ACI, *supra* note 10, § 2-4363.

294. LSOP, *supra* note 5, § 23-3.2(d). *See also* DOJ, *supra* note 11, § 10.20; ACA-ACI, *supra* note 10, § 2-4367.

295. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 1, ch. 18.

296. LSOP, *supra* note 5, § 23-8.1.

297. *Id.* § 23-8.3(a)-(b).

298. *Id.* § 23-8.3(c). Even during the initial stated period, an individual under disability

those urging a disability to prove a need for it.[299] Collateral consequences also can be forestalled or abrogated through expungement of convictions, which the ABA endorses in all criminal cases, not only those in which probation is assessed.[300]

ABA advocacy of abrogating restrictions on voting rights based on penal convictions has been mentioned.[301] The ABA rejects as well the following restrictions: loss of entitlements to initiate and defend civil actions under one's own name; eligibility to serve on juries except during actual confinement, probation or parole; power to execute judicially enforcible documents and agreements; and status to serve as court-appointed fiduciary except during actual confinement.[302] Nor should convicted persons lose their eligibility to marry[303] or to terminate marriage,[304] be deprived of parental rights, including the right to grant or withhold consent to adoption, or be disabled from adopting children.[305] Property and financial rights, including vested pension eligibility, should remain unaffected by criminal convictions,[306] and efforts by insurance carriers to impose special premium rates on convicted persons should be officially resisted unless a basis for such rate differentiations is established before state regulatory agencies.[307] The *Standards* recommend a maximum five-year period beyond which criminal convictions should not be revealed by commercial reporting agencies providing data in connection with credit or employment.[308]

Loss of eligibility to engage in various occupations may well frustrate whatever rehabilitation or deterrence has been accomplished through conviction and enforcement of penal sanctions. Therefore, the ABA position is that barriers to employment because of criminal convictions must rest on the existence of a substantial relationship between adjudicated criminal activity and later employment.[309] Legislatures should prohibit unreasonable barri-

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should be able to obtain relief by showing the disability no longer effectuates the governmental interest for which it was imposed originally.

299. *Id.* § 23-8.3(d). If, however, an affected person alleges a conviction has unfairly affected eligibility for private employment, he or she bears the burden of persuasion. *See id.* § 23-8.8(a)-(b).

300. *Id.* § 23-8.2.

301. *See* text accompanying notes 194-97 *supra*.

302. LSOP, *supra* note 5, § 23-8.5.

303. Federal district courts disagree about the constitutionality of bans or limitations on prisoners' eligibility to marry, in light of Zeblocki v. Redhail, 434 U.S. 374 (1978) (invalidating statute requiring court approval before parent subject to support order could remarry). *Compare* Salisbury v. List, 501 F. Supp. 105 (D. Nev. 1980) (limitation unconstitutional), *with* Wool v. Hogan, 505 F. Supp. 928 (D. Vt. 1981) (limitation valid). Most state authority sustains the validity of such prohibitions. *See, e.g.*, Rodriguez v. State, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979); Koerner v. New Jersey Dep't of Correction, 163 N.J. Super. 433, 394 A.2d 1262 (1978).

304. Conviction or confinement alone should not amount to abandonment for purposes of divorce or child custody, and convicted persons should be given appropriate aid in protecting their marital and parental status during confinement. LSOP, *supra* note 5, § 23-8.6(b).

305. *Id.* § 23-8.6(a).

306. *Id.* § 23-8.7(a)-(b).

307. *Id.* § 23-8.7(c).

308. *Id.* § 23-8.7(d). Limited coverage of the problem is found in federal legislation, 15 U.S.C. § 1681c(a)(5) (1976), but only if a credit line is for $50,000 or under or employment is at an annual salary of $20,000 or less.

309. LSOP, *supra* note 5, § 23-8.8(a). Factors bearing on employability include likelihood of opportunity to commit similar future offenses, time elapsed since conviction, conduct following

ers by both private[310] and public[311] employers against hiring criminal convicts. The extent to which removal of disabilities is accepted in a jurisdiction is an index of the degree to which the concept of either rehabilitation or measured retribution has gained public acceptance.

THE FUTURE ROLE OF THE STANDARDS

Implementation of most of the *Standards* can be accomplished through new legislation and rules of court governing criminal proceedings. For the most part, revision machinery is either under the control of judges and lawyers or receptive to recommendations from the legal profession. This is not as true of changes in correctional administration, a field in which there has been relatively little formal involvement by the legal profession and which has come under serious judicial scrutiny only in the past decade or so. Establishing a functional role in correctional reform is much less easy for the ABA to accomplish than in more directly legal fields.

It is unlikely as well that the ABA can gain a significant foothold in the recent American phenomenon of accreditation of correctional institutions, systems and programs. That process was launched less than a decade ago by the American Correctional Association and is now the responsibility of the Commission on Accreditation for Corrections.[312] The criteria for accreditation have been established from within the world of corrections administration. The ABA *Standards* are unlikely to be referred to other than as background against which accreditation panels can determine sufficiency of compliance with the more generally phrased ACA Standards.

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conviction, the circumstances of crime and offender and the likelihood such circumstances will reoccur.

310. *Id.* § 23-8.8(b). Protective legislation should cover denial of and discharge from employment; denial of fair employment conditions, pay or promotion; rejection of membership in unions or other organizations affecting employment; and denial or revocation of licenses required for a profession or occupation. The latter also is covered in *id.* § 23-8.8(f), which urges a substantial relationship between the crime and the occupational activity at issue.

311. *Id.* § 23-8.8(d). "Public employment" is defined in *id.* § 23-8.8(e). Conviction may justify forfeiture of elective or appointive office, held at the time of conviction, but should not automatically bar eligibility for future elective or appointive public office. *Id.* § 23-8.8(c).

312. *See generally* COMMISSION ON ACCREDITATION FOR CORRECTIONS, ACCREDITATION: BLUEPRINT FOR CORRECTIONS (1978); Sechrest, *The Accreditation Movement in Corrections*, 40 FED. PROB. NO. 4, (Dec. 1976). By the end of 1980, nearly 600 correctional facilities and programs had received or were engaged in preliminary procedures required for accreditation. Commission on Accreditation for Corrections, 1980 Annual Report (1981). The ten volumes of ACA STANDARDS, *supra* note 10, provide compliance criteria in reference to which accreditation is determined. Applicant institutions or agencies, after being granted candidate status, first conduct an elaborate self-evaluation to determine probable compliance levels. They next request a site inspection by a team of three or four professional consultants retained by the Commission. The team prepares a comprehensive report on compliance status which then is reviewed by a panel of five commissioners which meets with representatives of a candidate institution, considers appeals against audit team recommendations, and confers a three-year accreditation on agencies in compliance with a stated number of standards. The entire commission serves as an appeal body if objections are made to denial or deferral of accreditation. Agencies must present for approval action plans covering standards with which they are in noncompliance. Recertification requires repetition of the entire process of self-study, field audit and panel evaluation. Although in its early years the accreditation process was financed chiefly through LEAA and private foundation grants, the fees paid by candidate agencies now come close to meeting all expenses.

Consequently, a more limited scope for ABA implementation activity may prove possible in the instance of LSOP than is true of all other standards except possibly the *Urban Police Function Standards*.[313] Its impact may be twofold only. One is as a statement of policy by the ABA itself, so that future activities of ABA committees, sections and divisions can be guided by House of Delegates policy determinations. If the *LSOP Standards* merit revision, in the view of any ABA entity, the Standing Committee offers the mechanism through which recommendations for changes in black-letter text can be transmitted to the House of Delegates for consideration. The second is to provide guidelines for courts in state or federal litigation attacking prison or jail conditions. The ABA *Standards* are recognized by many correctional authorities as relatively more detailed on legal issues and therefore of greater intrinsic value as norms than the more succinctly phrased ACA Standards. They possess the cachet of the world's largest association of legal professionals. Therefore, to the extent a jail, prison or prison system in fact complies with the (minimum) recommendations set forth in LSOP, it is exceedingly unlikely that a court will find a deprivation of rights guaranteed by the federal or a state constitution. To the degree a correctional facility or program falls short of compliance, there is the risk that the ABA *Standards*, as well as other standards and guidelines, will be invoked by courts in placing legal restrictions on correctional administration.[314] Thus, time may establish that the greatest leverage favoring use of LSOP by prison administrators and legislators[315] will stem from their use as criteria by courts engaged in constitutional litigation.

313. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 1, ch. 1.

314. The ACA-ACI standards, *supra* note 10, occasionally have been cited in that way. *See, e.g.*, Rhodes v. Chapman, 101 S. Ct. 2392, 2397 n.8 (1981); Wolfish v. Levi, 573 F.2d 118, 127 n.20, 128 n.22 (2d Cir. 1978), *rev'd on other grounds sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979); Battle v. Anderson, 457 F. Supp. 719, 727 (E.D. Okla. 1978); Sterling v. Cupp, 625 P.2d 123, 131 n.20 (Or. 1981). The DOJ standards are also cited in Rhodes v. Chapman, 101 S. Ct. at 2400, n.13, 2404 n.6 (Brennan, J., concurring). For a reference to Tentative Draft No. 1 of LSOP, *see* Sterling v. Cupp, 625 P.2d at 131 n.19, 132 n.22.

315. The *Standards* urge state legislators to implement their contents and provide sufficient resources to ensure implementation of prisoners' legal rights. LSOP, *supra* note 5, § 23-7.4.

UNITED STATES V. PAYNER: CLOSING A LOOPHOLE IN THE FOURTH AMENDMENT EXCLUSIONARY RULE STANDING REQUIREMENT

INTRODUCTION

The fourth amendment exclusionary rule is restricted by a standing requirement. Evidence which results from an illegal search or seizure cannot be suppressed unless the constitutional rights violated are the defendant's; violation of a third party's rights is insufficient.[1] In *United States v. Payner*,[2] a majority of the Supreme Court adhered to this requirement of standing even though: (1) the Government's search and seizure clearly violated the fourth amendment[3] and, under state law, probably constituted the crime of larceny;[4] (2) the Government was aware its action would violate state law and the United States Constitution;[5] (3) the Government's illegal search and seizure was for the relatively insignificant purpose of gathering information about suspected tax evasion;[6] and (4) the Government deliberately circumvented the exclusionary rule by apparently instructing its agents to select their victims prudently.[7]

The Internal Revenue Service (IRS) suspected in 1972 that American taxpayers were illegally concealing funds in the Bahamas.[8] As part of its investigation, the IRS devised a scheme to relieve a visiting Bahamian bank vice president of the contents of his briefcase.[9] The IRS correctly theorized that the briefcase's contents would lead to the names of Americans holding Bahamian bank accounts not disclosed on their tax returns.[10] A woman was paid $1,000 to go out to dinner with the bank officer, who left the briefcase at her apartment.[11] A paid informant and an IRS special agent entered the apartment with a key the woman had provided and removed the briefcase.[12]

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1. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Tileston v. Ullman, 318 U.S. 44 (1943); Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. L. REV. 493 (1952).

2. 447 U.S. 727 (1980).

3. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

4. 447 U.S. at 747 n.13 (Marshall, J., dissenting) (quoting United States v. Payner, 434 F. Supp. 113 (N.D. Ohio 1977)).

5. 447 U.S. at 742.

6. *Id.* at 728.

7. *Id.* at 742 (Marshall, J., dissenting) (quoting United States v. Payner, 434 F. Supp. 113 (N.D. Ohio 1977)).

8. 447 U.S. at 738 (Marshall, J., dissenting).

9. *Id.*

10. *Id.*

11. *Id.* at 738-40. Justice Marshall implied that the $1,000 paid to the woman may have been in part "for what occurred in the [woman's] apartment prior to the couple's departure for dinner." *Id.* at 740 n.4.

12. *Id.* at 740-41. The IRS had earlier referred the special agent to a locksmith who made a key to fit the briefcase lock. *Id.*

IRS photography experts copied the contents, and the special agent replaced the briefcase. The district court found that the operation, entirely approved of by IRS supervisors,[13] "appear[ed] to satisfy a prima facie case of larceny under Florida law."[14]

Jack Payner was subsequently indicted.[15] The district court suppressed the fruit of the illegal search and seizure, without which the Government could not prove Payner "knowingly and willfully"[16] falsified his tax return.

The district court recognized that Payner lacked standing to invoke the fourth amendment exclusionary rule.[17] The suppression order was based instead on fifth amendment due process[18] and on the federal courts' inherent supervisory power.[19] The Sixth Circuit Court of Appeals affirmed on the basis of the supervisory power alone.[20] The Supreme Court reversed, holding that the supervisory power and fifth amendment due process could not substitute for fourth amendment standing.[21] This comment, like the Supreme Court opinion and the opinion for the Sixth Circuit Court of Appeals, will largely ignore *Payner's* fifth amendment implications[22] and will focus on the case's significance as a barometer of the interplay between the exclusionary rule standing requirement and the supervisory power of the federal courts. The merits of the exclusionary rule itself will be discussed only to the extent those merits are relevant to the supervisory power and to standing.

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13. *Id.* at 739.

14. *Id.* at 746-47 n.12 (quoting United States v. Payner, 434 F. Supp. 113 (N.D. Ohio 1977)).

15. Jack Payner was one of those Americans who had not disclosed his Bahamian bank account. Documents in the briefcase revealed a close association between the bank officer's Bahamian bank and a Florida bank. Subpoenas issued to the Florida bank uncovered a loan agreement in which Payner had pledged as security his funds in the Bahamian bank. Payner, however, had stated on his tax return that he did not have a foreign bank account.

The indictment charged violation of 18 U.S.C. § 1001 (1976) which provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements . . . shall be fined not more than $100,000 or imprisoned not more than five years, or both." 447 U.S. at 728.

16. 18 U.S.C. § 1001 (1976).

17. United States v. Payner, 434 F. Supp. 113, 125-26 (N.D. Ohio 1977), *aff'd per curiam*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980).

18. The district court's fifth amendment argument was unprecedented. It stated flatly that "[t]here is no standing problem in this case in regard to the Fifth Amendment Due Process question." 434 F. Supp. at 129 n.65. Apparently standing was not a problem for the district court because it believed that "the Court must furnish those persons who are the ultimate targets with standing to raise the exclusionary rule in order to insure that some party is available to litigate the question of the Government's outrageously unconstitutional activity." The defendant cannot invoke the fourth amendment exclusionary rule, however, so there is no reason that he should be able to invoke a fifth amendment exclusionary rule since the policies underlying both considerations presumably are identical. The district court implicitly acknowledged that the purpose of its newborn fifth amendment exclusionary rule would be identical to the fourth amendment exclusionary rule's purpose: deterrence. The court quoted extensively from Rochin v. California, 342 U.S. 165 (1952). In *Rochin*, however, standing was not at issue.

19. 434 F. Supp. at 126-36.

20. United States v. Payner, 590 F.2d 206 (6th Cir. 1979) (per curiam).

21. 447 U.S. 727 (1980).

22. *See* note 18 *supra*.

I. THE EXCLUSIONARY RULE STANDING REQUIREMENT

In *Jones v. United States*,[23] a narcotics case, the Court held that the defendant had standing to object to evidence resulting from an illegal search, even though the premises searched were not his, because he was legitimately on the illegally searched premises.[24] *Jones* represents the broadest reading of the Court's general rule that fourth amendment rights are personal rights that cannot be vicariously asserted, a rule later reaffirmed in *Alderman v. United States*.[25]

The *Alderman-Jones* test of standing continued substantially intact until *Rakas v. Illinois*.[26] Justice Rehnquist's *Rakas* opinion replaced the legitimately-on-the-premises test with the narrower test of whether the search and seizure "infringed an interest of the defendant which the Fourth Amendment was designed to protect."[27] The question ultimately may be whether the search offended the defendant's expectation of privacy.[28]

In *Rakas*, Justice Rehnquist significantly changed the standing question terminology, though, as he admits, probably not its substance.[29] He pointed out that standing, strictly speaking, relates to the concern that issues be sharply focused by adversary proceedings.[30] The adversarial relationship between the defendant and the prosecution is ordinarily sufficient to contest thoroughly the issue of whether there was an illegal search and seizure, because the defendant's liberty is likely at stake. The new terminology offered in *Rakas* is that the search and seizure must have violated the defendant's fourth amendment rights in order to avail him of the fourth amendment's exclusionary rule.[31]

II. THE MEANING OF THE SUPERVISORY POWER

In its broadest sense, the supervisory power may be described as the

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23. 362 U.S. 257 (1960), *overruled in part*, Rakas v. Illinois, 439 U.S. 128 (1978) *and in part*, United States v. Salvucci, 448 U.S. 83 (1980). *See* note 27 *infra* and accompanying text.

24. 362 U.S. at 264.

25. 394 U.S. 165 (1969).

26. 439 U.S. 128 (1978).

27. *Id.* at 140. *Rakas* thus restricted one of the alternate holdings of *Jones*. The other *Jones* holding was that the defendant had "automatic" standing where the possession required for standing was the possession needed to establish an element of the offense charged. Automatic standing was to prevent the government from contending that the defendant lacked the requisite possession for purposes of exclusionary rule standing, yet had possession for purposes of the offense charged. Justice Rehnquist questioned whether the *Jones* rule of automatic standing still lived. *Id.* at 135 n.4. Two days after *Payner*, the Court overruled the *Jones* rule of automatic standing. United States v. Salvucci, 448 U.S. 83 (1980).

28. Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1979) (Powell, J., concurring).

The defendant in *Payner* lacked standing because he had no "reasonable expectation of privacy" in his Bahamian bank account. 447 U.S. at 732 n.4 (citing United States v. Miller, 425 U.S. 435 (1976)). The Court rejected the defendant's argument that Bahamian bank laws produced an expectation of privacy not present in *Miller*. *Id.*

29. 439 U.S. at 139-40.

30. *Id.*

31. *Id.* at 140.

federal courts' general power to supervise the administration of justice.[32] Confusion arises, however, regarding the extent to which the power may be exercised when courts parrot this vague description as if it were a definition. Cases in which courts have wielded the power may be classified into four categories.[33] First, an appellate court occasionally will overturn a lower court decision for prejudicial error but inexplicably contend it is exercising its supervisory power.[34] The resulting confusion is needless. An appellate court surely can perform its primary function of review without conjuring up apparitions like the supervisory power.

In a second group of cases courts have employed the supervisory power to fashion rules for improving the quality of the judicial process.[35] The aim here is to foster fair and proper adjudication. The evolution of rules of evidence is an example. Although the Constitution dictates a floor of minimum safeguards beneath which the court shall not descend, the judicially developed rules of evidence are far above that minimum. Rules designed to improve the judicial process normally do not define substantive rights. Instead, they specify the procedure that experience has proven is most likely to produce accurate determinations. This second group of cases exemplifies what may be dubbed procedural supervisory power.

The third set of cases deals with enforcement of constitutional provisions.[36] Some proscriptions in the Constitution are mere "thou shalt nots" which fail to include an effective set of subsidiary rules to implement the commandment. The fourth amendment is notorious in this regard.[37] It is important to distinguish those cases in which the rule asserted by use of the supervisory power is *itself* a fundamental constitutional right from those cases in which the rule asserted by use of the supervisory power is merely a means to protect a fundamental constitutional right. The holdings of those cases in which the rule itself is a constitutional right can be said to flow directly from the Constitution. They are not exercises of the supervisory power but are simply constitutional interpretations. Due process and freedom of speech cases are outstanding examples. The holdings of those cases in which the rule is a means to protect a constitutional right are legitimate exercises of the supervisory power. They are the substantive analogue to the procedural supervisory power used in connection with improving the judi-

32. McNabb v. United States, 318 U.S. 332, 341 (1943); Nardone v. United States, 308 U.S. 338, 342 (1939).

33. The last three of these four categories are similar, but not identical, to the three categories described in Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193-94 (1969) [hereinafter cited as Hill].

34. *See* Burton v. United States, 483 F.2d 1182, *rev'd on rehearing*, 483 F.2d 1190 (9th Cir. 1973). In *Burton*, the appellate court initially reversed and remanded after finding prejudicial error. Needlessly, it rested its decision to reverse on the supervisory power, not on its general power to reverse for prejudicial error.

35. *See* McNabb v. United States, 318 U.S. 332 (1943) (exclusion of confessions obtained under duress); Hill, *supra* note 33, at 194-96, and cases cited therein.

36. *See* Nardone v. United States, 308 U.S. 338 (1939) (enforcement of wiretapping statute); Weeks v. United States, 232 U.S. 383 (1914) (enforcement of fourth amendment prohibition against illegal searches and seizures); Hill, *supra* note 33, at 198-99.

37. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 643-44.

cial process.[38]

Procedural supervisory power designs rules to achieve the goal of fair and proper adjudication. Substantive supervisory power designs rules to achieve the goal of enforcing the spirit of the Constitution. The key point is that supervisory power, both procedural and substantive, is the basis for rules of law that are not constitutionally mandated. Therefore, unlike rules of constitutional interpretation, any supervisory power rule may be replaced or eliminated. Because the supervisory power rules are the prophylaxes for constitutional rights, not sacrosanct themselves, the courts should mold them freely as conditions change and needs arise. Unfortunately, they are often confused with the rules that are constitutionally mandated.

Confusing constitutional interpretation with the supervisory power does not necessarily delay the development of constitutional law, but it does mislabel the court's action. The effect of this mislabeling is that a rule based on the supervisory power mistakenly becomes elevated to a rule of constitutional law. Because courts are loath to revise an interpretation of the Constitution, the rule lingers on long after it should have been revised. Less confusion would result if courts forging new constitutional rights would initially declare that those rights have constitutional status. Rules created by legitimate exercises of the supervisory power, those rules that merely enforce already established constitutional rights, could then be subjected to more rapid and responsive shaping over time by the Congress, the state legislatures, and the courts themselves.

Most jurists and commentators do not doubt that the above three strains of supervisory power, though often misnamed, exist.[39] Others disagree, however. Chief Justice Burger, in his concurring opinion in *Payner*, stated that "[o]rderly government under our system of separate powers calls for internal self-restraint and discipline in each Branch; this Court has no general supervisory authority over operations of the Executive Branch, as it has with respect to the federal courts."[40] Does the Chief Justice mean to say that the Court, in its effort to promote the Bill of Rights, cannot develop rules of enforcement against government agents if those agents happen to work in the executive branch? If the answer is yes, how does he justify the exclusionary rule when the defendant does indeed have standing?[41]

The Chief Justice may have had in mind the fourth possible exercise of the supervisory power. This fourth category comprises cases in which courts invent a rule which does not flow from, and does not purport to enforce, the Constitution, and is not meant to improve the accuracy of the judicial process. The rule is simply a judicial response to distasteful official conduct.[42]

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38. *See* text accompanying note 35 *supra*.

39. *See* Hill, *supra* note 33; Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963). *See also* note 56 *infra*.

40. 447 U.S. at 737 (Burger, C.J., concurring).

41. Perhaps he does not. The Chief Justice has been a steadfast critic of the rule in any form since long before he joined the Supreme Court. *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964). Shortly after becoming Chief Justice, he again attacked the rule and proposed in some detail a statutory alternative. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

42. Hill, *supra* note 33, at 199.

Here lies a real danger of boundless judicial lawmaking. The apprehension of an uncircumscribed power of adjudication by judicial discretion is well-founded. To date, fortunately, few if any courts have gone this far.[43]

III. THE EXCLUSIONARY RULE AS AN EXERCISE OF THE SUPERVISORY POWER

The effect of the exclusionary rule often hinges on the analysis of its purpose and on the power of the courts to apply it. Aside from the above outline, some authorities have advanced a type of supervisory power based on what may be called the judicial integrity theory.[44] With regard to the exclusionary rule, the argument is that illegally seized evidence must be excluded to protect the integrity of the judiciary, by preventing the courts from becoming "accomplices"[45] to wrongful official acts. This rationale appears appealing, for it promotes the illusion that the rule does not interfere with the prerogatives of other branches. As in civil litigation, the courts merely withhold their facilities from those with "unclean hands."[46]

The case which created the exclusionary rule[47] was based on the judicial integrity theory, and it was not until about the time the rule was applied to the states that the deterrence theory appeared.[48] Presumably, the shift in reasoning occurred because a theory of supervisory power exclusion that is defended as necessary to maintain judicial integrity is quickly met at the

43. *Id.* at 200. Justice Frankfurter's broad language in Rochin v. California, 342 U.S. 165 (1952) is the nearest precedent for exercise of this fourth type of supervisory power. There he spoke of the need to observe "canons of decency and fairness" as a due process requirement. *Id.* at 169. By basing his holding on due process grounds it is evident the decision was actually a constitutional interpretation. Furthermore, any precedential value of *Rochin* is diminished because it was decided before the exclusionary rule was imposed on the states by Mapp v. Ohio, 367 U.S. 643 (1961). After *Mapp*, a *Rochin* situation could be decided on the fourth amendment exclusionary rule without resorting to due process.

Later, in Hampden v. United States, 425 U.S. 484 (1976), Justice Rehnquist asserted for the Court that due process is relevant "only when the Government activity in question violates some protected right of the *defendant*." *Id.* at 490 (emphasis in original). Justices Powell and Blackmun were unwilling to join in such a rigid approach. They suggested that under some circumstances, due process principles or the supervisory power could bar conviction. *Id.* at 495 (Powell, J., concurring). Justice Blackmun apparently thought *Payner* presented those circumstances, for he dissented in *Payner*. Justice Powell apparently disagreed, for he wrote the *Payner* opinion for the Court.

44. Elkins v. United States, 364 U.S. 206, 217 (1960); Mesarosh v. United States, 352 U.S. 1, 14 (1956); McNabb v. United States, 318 U.S. 332, 342 (1943).

45. Elkins v. United States, 364 U.S. 206, 223 (1960); McNabb v. United States, 318 U.S. 332, 345 (1943).

46. Olmstead v. United States, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting).

Some writers have embraced the judicial integrity theory but only as a pretense for the rapid development of constitutional law. *See, e.g.*, Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1666-67 (1963). Those writers would have the courts promulgate tentative rules, which, if met with public acceptance, would become constitutional rights of due process. Such an approach has at least three defects. First, the process would overtly subordinate the judiciary to the cry of popular opinion. Second, it is not certain that the growth of constitutional law is or need be slow. Third, it does not follow that if the supervisory power is to protect the integrity of the judiciary, then the principles it produces should become constitutional rights of due process. The defendant, not the judiciary, is the object of due process. Any benefits accruing to defendants out of a system designed to protect the judiciary would be happenstance.

47. Weeks v. United States, 232 U.S. 382 (1914).

48. *See* Elkins v. United States, 364 U.S. 206 (1960).

state level with the response that state courts are free to establish their own standards of integrity. Federal courts lack the power to impose subjective levels of integrity upon state courts.[49]

The judicial integrity rationale has always been unsound. Permitting adjudication after official misconduct no more makes the court an accomplice to the misconduct than permitting the defendant to state his case makes the court an accomplice to his crime. By closing the courthouse doors when confronted with official misconduct, the judiciary does more than avoid complicity; it affirmatively stymies law enforcement. It is a fantasy to pretend that the judiciary, merely because it is a separate branch, is not an integral and necessary component of law enforcement. Courts that simply close their doors wrongfully decline to perform the function that is theirs alone. In effect, they pass on the merits of the prosecution.[50]

The judicial integrity theory notwithstanding, the exclusionary rule is best justified as an exercise of substantive supervisory power.[51] It enforces a constitutional directive; it is not a constitutional directive in itself. *Mapp v. Ohio*,[52] according to some commentators, concluded the opposite—that the rule was more than a product of the supervisory power.[53] If the rule is not compelled by the Constitution, how could it be imposed on the states? The answer requires consideration of the peculiar genesis of *Mapp*.

The court in the earlier case of *Wolf v. Colorado*[54] reaffirmed that the rule was not constitutionally mandated and, therefore, the states were free to enforce the fourth amendment with methods of their choice. Unfortunately, in the interim between *Wolf* and *Mapp*, most states failed to devise any enforcement methods whatsoever. Exasperated by state indifference, the *Mapp* Court finally insisted that the states adopt the rule. Analyzed in this light, it is apparent that the exclusionary rule per se is not necessary to the fourth amendment. Rather, it is necessary that the amendment be enforced. *Wolf* appeared to issue a warning, which the states ignored, of the upcoming *Mapp* decision.[55] In summary: (1) *Wolf* necessarily read into the fourth amendment a constitutional requirement of enforcement; (2) as an exercise of its supervisory power, the federal courts chose to enforce the amendment with the exclusionary rule; (3) the states were allowed to develop their own enforcement provisions; and (4) *Mapp* imposed the enforcement provision with which it was acquainted, the exclusionary rule, on the states when the states failed to develop their own effective enforcement. The plurality opinions of *Mapp* are garbled, but commentators and subsequent cases have supported the foregoing analysis of *Wolf* and *Mapp*.[56]

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49. Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting).

50. *See* Sorrells v. United States, 287 U.S. 435, 450 (1932); Hill, *supra* note 33, at 205-07.

51. *See* text accompanying note 38 *supra*.

52. 367 U.S. 643 (1961).

53. Allen, *Federalism and the Fourth Amendment: A Requiem for* Wolf, 1961 SUP. CT. REV. 1.

54. 338 U.S. 25 (1949).

55. *See id.*

56. Most of the commentators on the exclusionary rule have debated the merits of the rule itself, not the power of the court to apply it. Geller, *supra* note 37; Burger, *supra* note 41; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). It is noteworthy that Judge Friendly remarked that no majority of the Supreme Court has ever held that the

IV. THE SUPERVISORY POWER IN *PAYNER*

Justice Powell's opinion for the Court and Justice Marshall's dissent are founded on different premises. Justice Marshall based his dissent on the judicial integrity theory,[57] a theory upon which a majority of the Court has not relied in a decade or more.[58] Accordingly, standing is irrelevant to Justice Marshall because the taint on the judiciary is identical whether the evidence was illegally seized from the defendant or from a stranger. The defendant is the lucky beneficiary of a rule designed to protect the courts. This comment rejects the judicial integrity rationale but, if embraced, Justice Marshall's analysis follows logically.

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fourth amendment compels the exclusionary rule. United States v. Soyka, 394 F.2d 443 (2d Cir. 1968) (Friendly, J., dissenting). Since Judge Friendly's 1968 *Soyka* opinion the Supreme Court has, if anything retreated still further from any lingering notion that the rule is constitutionally compelled. Shortly after *Soyka*, Justice White said for the Court that "[n]either [Linkletter v. Walker, 381 U.S. 618 (1965) and Elkins v. United States, 364 U.S. 206 (1960)] nor any others hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment." Alderman v. United States, 394 U.S. 165, 174 (1969). Later the rule was called by Justice Powell a "judicially created remedy . . . rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). Justice Blackmun's opening sentence for the Court in United States v. Janis, 428 U.S. 433 (1976) referred to "the judicially created exclusionary rule . . . ." Id. at 434.

If the rule is not constitutionally compelled, it seems likely that it is a product of the supervisory power, as broadly defined by Professor Hill and in this Comment. Hill, *supra* note 33, at 193. Another interesting explanation is that the exclusionary rule and other subsidiary rules not required by the Constitution comprise the "Constitutional common law." Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 1 (1975). *But see* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978). Professor Monaghan's Constitutional common law differs from this comment's procedural and substantive supervisory power mainly in name. The point is that a body of rules exists, which is specifically mandated by the Constitution, but which can be imposed on the states to enforce the Constitution.

57. 447 U.S. at 747-48.

58. *See* text accompanying notes 44-48 *supra*. One would probably have to look all the way back to McNabb v. United States, 318 U.S. 332 (1943), to find a Supreme Court decision resting exclusively on the judicial integrity rationale. The most lucid descriptions of the theory are in the dissents of Justices Brandeis and Holmes in Olmstead v. United States, 277 U.S. 438 (1928). Cases decided shortly before and after Mapp v. Ohio, 367 U.S. 643 (1961), relied on both the judicial integrity and deterrence theories, *see, e.g.*, Elkins v. United States, 364 U.S. 106 (1960), or principally on the deterrence theory, *see, e.g.*, Linkletter v. Walker, 381 U.S. 618 (1965). Justice White, in Alderman v. United States, 394 U.S. 165 (1969), declared that "[t]he necessity for [standing] was not eliminated by recognizing and acknowledging the deterrent aim of the rule." *Id.* at 174 (citing *Linkletter* and *Elkins*). The judicial integrity theory was altogether abandoned in United States v. Calandra, 414 U.S. 338 (1974). "For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct." *Id.* at 360 (Brennan, J., dissenting). *Accord*, United States v. Janis, 428 U.S. 433 (1976) (citing *Calandra*). *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 669 (1970).

One pair of writers has contrasted the majority and dissenting *Calandra* opinions as based on the "fragmentary" and "unitary" models of government respectively. Schrock & Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 255-60 (1974). Under the fragmentary model, the judiciary is seen as distinct from the prosecution and law enforcement. Since the court's function is to find the truth, the out-of-court activities of Government officials are immaterial. Illegally obtained evidence is admitted for its probative value without approval or condemnation of the means by which it was obtained. *Id.* at 255-56. By contrast, under the unitary model, the court is a part of the government. A wrong committed by Government agents becomes a wrong by the judiciary if the court permits the prosecution to enjoy the fruits of the wrong. *Id.* at 257-60. For an answer to the unitary model, see note 50 *supra* and accompanying text.

On the other hand, Justice Powell's opinion for the Court continues the trend which values the rule primarily for its deterrent function.[59] The exclusion of often highly probative evidence is the price paid to deny government agents the incentive to violate the fourth amendment. The price is paid only when the need to deter outweighs the general need to admit all relevant evidence.[60] The Court might have paused for pedagogical reasons to draw the line between constitutional rights and the supervisory power, but was correct in stating that "[t]he values assigned to the competing interests do not change because the court has elected to analyze the question under the supervisory power instead of the fourth amendment."[61]

This comment has asserted that the exclusionary rule is and always was a product of the supervisory power, despite its disguises.[62] Ironically, the district court circumvented the exclusionary rule standing requirement by asserting outright the same authority that covertly created the rule: the supervisory power. Analyzed in this perspective, the district court's supervisory power argument, which was but one of several grounds for its holding, must collapse. Moreover, Justice Powell's arguments that the competing interests are unchanged by a supervisory power analysis and that the fourth amendment exclusionary rule "serves precisely the same purposes"[63] are obviously accurate. The only confusion is semantics.

Payner is an example of a district court that, faced with particularly reprehensible official misconduct, avoided the fourth amendment exclusionary rule and its attendant standing requirement by means of a trick in terminology. The Supreme Court Justices, except perhaps the Chief Justice,[64] did not seem to dispute that the supervisory power exists. Justice Powell, though he may narrow the scope of the power more than the dissenters would, nonetheless, conceded its existence.[65] The disagreement was whether the power, whatever its name, should be exercised when an illegal search and seizure violates rights other than the defendant's. In other words, the issue was the familiar one of standing. The majority refused to permit new wording to influence old law. Justice Marshall for the dissenters saw a need to carve out

59. Justice Powell said that "the Fourth Amendment exclusionary rule . . . is applied in part 'to protect the integrity of the *court* rather than to vindicate the constitutional rights of the defendant . . . .'" 447 U.S. at 736 n.8 (quoting Justice Marshall's dissent in *Payner*, 447 U.S. at 746) (emphasis in the original). The judicial integrity interest apparently did not tip the balance of competing interests appreciably, because Justice Powell went on to state that "the interest in preserving judicial integrity and in deterring such conduct is outweighed by the societal interest in presenting probative evidence to the trier of fact." *Id.* The majority's footnoted judicial integrity discussion may have been an afterthought to meet the dissent's argument, or the majority may genuinely believe that the need to present probative evidence justifies tainting the Court by making it an "accomplice" to the Government's misconduct. The majority's argument would have been more persuasive had it forthrightly disavowed the judicial integrity theory, as in United States v. Calandra, 414 U.S. 338 (1974). *See* discussion in note 58 *supra*. Oddly, Justice Powell cites *Calandra* while also acknowledging the judicial integrity theory.

60. United States v. Janis, 428 U.S. 433, 453-54 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974).

61. 447 U.S. at 736.

62. *See* text accompanying note 51 *supra*.

63. 447 U.S. at 736 n.8.

64. *See* text accompanying note 40 *supra*.

65. 447 U.S. at 736 n.8.

an exception to the old law of standing. Neither opinion directly confronts the rationale of the standing requirement.

The modern view, however, to which this comment conforms, is that the exclusionary rule is not a constitutional right. It is merely a judicially created means to enforce the Constitution.[66] The defendant, therefore, does not assert his constitutional right to exclusion of the evidence. Rather, the defendant demands that the judiciary duly exercise its commitment to deter illegal searches and seizures. The deterrence is nonexistent absent the punishment of exclusion. Neither "standing" nor the shibboleth of "personal constitutional rights"[67] can justify restriction of the exclusionary rule to cases where the search violated the fourth amendment rights of the defendant rather than those of a stranger. The balance of competing interests should not shift toward the prosecution when the defendant lacks standing, because the rights of the particular defendant are not elements of the interests that are balanced. Rather, the principal interest for exclusion is the need to deter illegal searches generally. A rule for deterrence, unlike a rule for compensation, operates prospectively only, and for the benefit of an undetermined class. It is irrelevant that the victim was not the defendant because the purpose of the deterrence rule is to prevent future wrongs against other potential victims, not to compensate for a past wrong against the present victim. To withhold the exclusionary rule from all defendants except those who are victims deters illegal searches of defendants only. Limited application means limited deterrence. It seems that the rest of the public is equally entitled to protection by deterrence.[68]

CONCLUSION

Application of the unpopular and expensive exclusionary rule[69] is restricted by the rule that evidence obtained by an unconstitutional search is not excluded unless the defendant's constitutional rights were violated. The restrictive rule has been, and probably will continue to be, inaccurately called a rule of standing.[70] Whatever the rule's name, the restriction bears no rational relation to the purpose of the rule or to the source of the power

66. *See* note 56 *supra*.

67. *See* text accompanying notes 23-31 *supra*.

68. *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 352-66 (1967).

69. The rule seems about to be swallowed by exceptions contrived to limit its application. The independent source exception, which developed almost immediately after the rule itself, permits the use of illegally seized evidence if the Government can show it would have obtained the evidence through independent legal means. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The attenuation exception provides that fruits of an illegal search may be admissible if the connection between the offered evidence and the illegal search is sufficiently "attenuated as to dissipate the taint." Nardone v. United States, 308 U.S. 338, 341 (1939).

Illegally seized evidence may be used before a grand jury, United States v. Calandra, 414 U.S. 338 (1974); for purposes of impeachment, Walder v. United States, 347 U.S. 62 (1954); in a parole revocation hearing, United States v. Winsett, 518 F.2d 52 (9th Cir. 1975); and for purposes of sentencing, United States v. Schipan, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971). Justice Marshall views the Court's recent decisions as an orchestrated "erosion" of the exclusionary rule. Rawlings v. Kentucky, 448 U.S. 98, 121 (1980) (Marshall, J., dissenting).

70. *See* text accompanying notes 26-31 *supra*.

which created the rule. What is worse, the standing restriction invites deliberate official violations of a third party's fourth amendment rights, which is exactly what happened in *Payner*. It is difficult to find logic or justice in a judicial system which suppresses evidence gathered from a technically and accidentally illegal search, such as when a warrant is defective, but admits evidence flowing from a grossly and deliberately illegal search, such as when government agents commit larceny.

Until courts or legislatures find substitutes for the exclusionary rule,[71] such paradoxes will persist. A broad application of the rule will continue to discourage fourth amendment violations. *Payner*, however, removes the supervisory power from the district courts' collection of devices with which to avoid the standing requirement, at least when the government acts are no more serious than larceny. It remains to be seen whether government conduct will descend still further to embrace worse crimes.[72] Unless other fourth amendment remedies are fashioned, *Payner* may encourage another step in that direction.

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71. Because the rule is not constitutionally mandated, there is no constitutional objection to replacing it. For a complete overview of the other remedies proposed, see Geller, *supra* note 37, at 689-722.

72. It has been suggested that the severity of the fourth amendment violation should be material when determining whether to apply the exclusionary rule. *See* Brown v. Illinois, 422 U.S. 590, 609-10 (1975) (Powell, J., concurring in part); Comment, *Fruit of the Poisonous Tree - A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1153 (1967).

JENKINS V. ANDERSON: THE FIFTH AMENDMENT FAILS TO PROTECT PREARREST SILENCE

INTRODUCTION

In *Jenkins v. Anderson*,[1] the United States Supreme Court allowed the prosecution to impeach the credibility of a criminal defendant's testimony based upon his prearrest silence. It is argued here that the Court's analysis was unsatisfactory and that a vital fifth amendment right has been sacrificed for greater prosecutorial proficiency.

Dennis Jenkins was charged with first-degree murder and tried in a Michigan state court. The defendant's evidence showed that on August 12, 1974, the defendant's sister and her boyfriend were robbed by Doyle Redding and another man. The defendant, Dennis Jenkins, who was nearby, followed the thieves to their destination and reported their whereabouts to the police. The next day, the defendant stabbed and killed Redding. The defendant did not immediately report the stabbing, but did turn himself in to the authorities two weeks later.[2]

At trial, Jenkins took the stand and, for the first time, related an exculpatory version of the event. He testified that on August 13, 1974, he encountered Redding, who accused him of informing the police of the robbery. Then, according to the defendant, Redding attacked him with a knife, and in the ensuing struggle Redding was killed. At trial, Jenkins at all times maintained that he acted solely in self-defense.[3]

On cross-examination, the prosecutor asked the defendant the following questions over the objection of the defendant's counsel:

> Q. And I suppose you waited for the police to tell them what happened?
> A. No, I didn't.
> * * *
> Q. Did you ever go to a Police Officer or to anyone else?
> A. No, I didn't.[4]

The prosecutor again referred to Jenkins' prearrest silence in the closing argument. The defendant was convicted of manslaughter and sentenced to ten to fifteen years' imprisonment.[5]

After exhausting his state remedies, Jenkins sought a writ of habeas corpus in the federal district court. He contended that his constitutional rights were violated by the prosecutor's questions relating to his prearrest silence. The district court denied relief and the United States Court of Appeals for the Sixth Circuit affirmed.[6] The United States Supreme Court

1. 447 U.S. 231 (1980).
2. *Id.* at 232.
3. *Id.*
4. *Id.* at 233.
5. *Id.* at 234.
6. 599 F.2d 1055 (6th Cir. 1979).

granted certiorari.[7] The Supreme Court held that the use of prearrest silence to impeach a criminal defendant's credibility does not violate the fifth or fourteenth amendments.[8]

I. SILENCE PROTECTED: A REVIEW OF PRE-*JENKINS* LAW

The use of a criminal defendant's silence at and before trial is not a new issue.[9] Numerous Supreme Court decisions have dealt with adverse comment by the prosecution on the defendant's silence at trial[10] and with the use of post-arrest silence to impeach the credibility of a testifying criminal defendant.[11]

A. *Adverse Comment*

Since the 1965 case of *Griffin v. California*,[12] the fifth amendment has been held to insure that the silence of a criminal defendant may not be adversely commented upon at trial[13] because such comment would be an impermissible penalty imposed for exercising a constitutional privilege.[14] Just as one may not be compelled to forfeit his privilege against self-incrimination, an individual also has the right not to suffer any penalty for the assertion of a constitutional right. In order to preserve fully the value of the fifth amendment right to silence, adverse comment upon the assertion of such a right must not be allowed.

This "penalty doctrine," first established in *Griffin*, was explained and narrowed in *McGautha v. California*[15] and *Chaffin v. Stynchcombe*.[16] The *McGautha* Court ruled that the Constitution is not violated unless the compulsion of an election between constitutional rights "impairs to an appreciable extent any of the policies behind the rights involved."[17] *Chaffin* recognized that the Constitution does not forbid every government-imposed choice,[18] and implied that the courts should consider whether the state has a legitimate interest in the challenged procedure.[19]

B. *Impeachment*

Prosecutors often attempt to impeach a defendant's credibility at trial

7. 444 U.S. 824 (1979).
8. 447 U.S. 231 (1980).
9. *See, e.g.*, Doyle v. Ohio, 426 U.S. 610 (1976); Griffin v. California, 380 U.S. 609 (1965); Raffel v. United States, 271 U.S. 494 (1926); Wilson v. United States, 149 U.S. 60 (1893).
10. *See, e.g.*, Griffin v. California, 380 U.S. 609 (1965); Wilson v. United States, 149 U.S. 60 (1893).
11. *See* Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975); Raffel v. United States, 271 U.S. 494 (1926). *See also* Grunewald v. United States, 353 U.S. 391 (1957).
12. 380 U.S. 609 (1965).
13. *Id.* at 615.
14. *Id.* at 614.
15. 402 U.S. 183 (1971), *vacated*, 408 U.S. 941 (1972).
16. 412 U.S. 17 (1973).
17. 402 U.S. at 213.
18. 412 U.S. at 32.
19. *Id.* at 30-33.

by questioning him about his pre-and post-arrest silence. In *Raffel v. United States*,[20] the Supreme Court allowed the impeachment of a criminal defendant based upon his silence at a previous trial. In *Raffel*, the defendant was charged with violating the National Prohibition Act.[21] At his first trial, the defendant elected not to testify despite the testimony of a government agent that the defendant had made certain admissions to him prior to arrest.[22] When the first trial ended in a mistrial, Raffel elected to testify at his second trial and denied making the purported admissions.[23] On cross-examination, he was asked why he had not testified at the first trial.

In allowing the impeachment, the Court stated that once a defendant takes the stand, he completely waives his immunity of silence and may be cross-examined like any other witness.[24] The narrow holding[25] of *Raffel* was that a defendant's fifth amendment immunity, asserted at a previous trial, does not survive his appearance in a second trial so as to shield his previous silence from comment.[26] The Court found no justification in the underlying fifth amendment policies for extending the defendant's immunity from testifying beyond the trial in which the privilege is exercised.[27]

Nearly a half century later, the Court again addressed the issue of impeachment by reference to a defendant's post-arrest silence. In *United States v. Hale*,[28] the defendant was arrested and convicted of robbery. At the time of arrest and up until trial, the defendant remained silent and refused to explain his possession of $158. He related an exculpatory version at trial, and his testimony was impeached by prosecutorial remarks about his pretrial silence.[29] The Court distinguished *Raffel* on its facts and relied instead on its 1957 decision of *Grunewald v. United States*,[30] which held that it was unlawful to cross-examine a defendant about his fifth amendment invocation at a prior grand jury hearing. The Court in *Hale* reversed the conviction by exercising its supervisory power over the federal courts, holding that it was error to permit cross-examination of the defendant concerning his silence during police interrogation.[31] The Court ruled that any valid impeachment of

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20. 271 U.S. 494 (1926).

21. National Prohibition Act, ch. 85, 41 Stat. 305 (1919) (tits. I-II repealed by Liquor Law Repeal and Enforcement Act, ch. 740, § 1, 49 Stat. 872 (1935)).

22. 271 U.S. at 495. At the trial a prohibition officer testified that he had searched a drinking establishment. After the search Raffel admitted to owning the establishment. *Id.*

23. *Id.*

24. *Id.* at 496-97.

25. The case came to the Court upon a certified question: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified . . . upon the first trial[?]" *Id.* at 496. The Court answered in the negative. *Id.* at 499.

26. *Id.* The holding of *Raffel* is questionable in light of later cases. *See* text accompanying notes 68-85 *infra*. Various state cases have concluded that *Raffel* has been impliedly overruled or so eroded as to lack authority. *See, e.g.*, Raithel v. State, 40 Md. App. 107, 388 A.2d 161 (1978); State v. Carmody, 253 N.W.2d 415 (N.D. 1977); McFadden v. Page, 428 P.2d 338 (Okla. Crim. App. 1967); Commonwealth v. Jones, 229 Pa. Super. Ct. 236, 327 A.2d 638 (1974); Dean v. Commonwealth, 209 Va. 666, 166 S.E.2d 228 (1969).

27. 271 U.S. at 498-99.

28. 422 U.S. 171 (1975).

29. *Id.* at 174.

30. 353 U.S. 391 (1957). For a discussion of *Grunewald*, see text accompanying notes 74-78 *infra*.

31. 422 U.S. at 181.

prior inconsistent statements requires that the prior statement[32] be inconsistent with the testimony at trial.[33] Failure to establish the threshold inconsistency between the statements mandates that the prior silence be found devoid of probative value and therefore excludable.[34] Silence, the Court reasoned, is normally so ambiguous that it lacks probative force.[35]

In *Hale*, there were so many alternative explanations[36] for the defendant's silence that his silence established no inconsistency with his trial alibi.[37] Thus, any probative value that existed was outweighed by the possible prejudicial impact.[38] The Court's decision rested on evidentiary grounds, avoiding the constitutional issues. Such avoidance, however, was short-lived.

One year after *Hale*, the Court reached the constitutional issue of impeachment through the use of post-arrest silence in *Doyle v. Ohio*.[39] Doyle was arrested for selling narcotics and given his *Miranda* warnings.[40] At the time of arrest and until trial, Doyle remained silent. At trial, he related an exculpatory defense for the first time.[41] The prosecutor asked him on cross-examination why he had not told this story to the police.[42] He was convicted by the state court, and the United States Supreme Court granted certiorari to resolve a conflict among the federal courts of appeals.[43] The Court held that the use of post-arrest silence to impeach the testimony of a defendant who received the *Miranda* warnings at the time of arrest would be fundamentally unfair and a deprivation of due process.[44] The Court reasoned that post-arrest silence is "insolubly ambiguous" because the silence may be an exercise of the *Miranda* rights recently communicated.[45] Moreover, the *Miranda* warnings are an implied assurance to the arrestee that his silence will not be used against him.[46]

Significantly, the *Doyle* Court noted that silence at the time of arrest may be inherently ambiguous apart from the effect of the *Miranda* warnings.[47] While the issue of post-arrest silence apparently was settled, what remained unresolved was the constitutional validity of impeaching a defend-

32. Wigmore's definition of "inconsistent statement," incorporates behavior, which includes silence. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1040, at 1050 (J. Chadbourne rev. ed. 1970).

33. 422 U.S. at 176.

34. *Id.*

35. *Id.*

36. *See* text accompanying notes 118-19 *infra*.

37. 422 U.S. at 180.

38. *Id.*

39. 426 U.S. 610 (1976).

40. Miranda v. Arizona, 384 U.S. 436 (1966), held that a number of procedural safeguards must be followed before the prosecution will be allowed to use statements made by a suspect during custodial interrogation. Specifically, the Court noted that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

41. Doyle maintained that he was buying the narcotics, not selling them. 426 U.S. at 613.

42. *Id.*

43. 423 U.S. 823 (1975). For a list of federal cases, see 422 U.S. at 173 n.2.

44. 426 U.S. at 618.

45. *Id.* at 617.

46. *Id.* at 618.

47. *Id.* at 617 n.8.

ant's testimony by commenting on silence maintained *prior* to the time of arrest.

II. *JENKINS V. ANDERSON*: THE PROTECTION FAILS

Because the defendant in *Jenkins* asserted violations of his fifth amendment and due process rights, the Supreme Court was forced to face the constitutional issues posed by impeachment through the use of prearrest silence. Although the majority noted that the fifth amendment protects a defendant against comment by the prosecution when the defendant remains silent throughout the trial,[48] the Court relied on *Raffel* to conclude that the use of prearrest silence for impeachment of a criminal defendant does not violate the fifth amendment.[49] The majority interpreted *Raffel* as standing for the proposition that once a defendant elects to testify he may be impeached with his prior silence.[50] In a footnote, the Court indicated that this is true even when the silence stems from an invocation of the fifth amendment privilege.[51]

The Supreme Court next confronted the argument that the prosecutor's impeachment of Jenkins' testimony was an impermissible burden on the fifth amendment right to silence. Relying on the rules of *McGautha*[52] and *Chaffin*[53] and the holding of *Raffel*,[54] the Court found a legitimate state interest in such impeachment (the Court's truth-finding function)[55] and no impairment of the policies underlying the privilege.[56]

In addressing the defendant's due process claim, the majority recognized the common law rule that witnesses may be impeached by their prior silence in situations in which an assertion naturally would have been made.[57] The Court impliedly found that the assertion naturally should have been made by Jenkins; its absence was inconsistent with his exculpatory testimony and, as such, probative.[58] The Court held that *Doyle* was not applicable in this situation, because the due process violation in *Doyle* was a result of governmental action which induced the defendant to remain silent.[59] Since Jenkins' silence took place before he was taken into custody and given *Miranda* warnings, there was no governmental inducement and, therefore, no due process violation.[60] Finding no constitutional violation, the Court affirmed the Court of Appeals' denial of habeas corpus. Justices Stevens and Stewart concurred.[61]

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48. 447 U.S. at 235 (citing Griffin v. California, 380 U.S. 609 (1965)).
49. 447 U.S. at 235-36.
50. *Id.* at 235.
51. *Id.* at 236 n.2.
52. 402 U.S. 183 (1971). *See* text accompanying notes 17-19 *supra*.
53. 412 U.S. 17 (1973). *See* text accompanying notes 17-19 *supra*.
54. *See* text accompanying notes 24-27 *supra*.
55. 447 U.S. at 238.
56. *Id.* at 236.
57. *Id.* at 239.
58. *Id.* at 240.
59. *Id.*
60. *Id.*
61. Justice Stewart concurred with the majority on all points except the fifth amendment

Justices Marshall and Brennan dissented, finding violations of due process, of the privilege against self-incrimination, and of the right to testify in one's own behalf.[62] The dissenters maintained that an accused has an absolute right to testify in his own behalf and a right not to incriminate himself prior to trial. To force an individual to choose between such fundamental guarantees would be a violation of the constitutional provision from which those rights evolve. Thus, the impeachment evidence places an impermissible burden on the fifth amendment privilege against self-incrimination and the right of an accused to testify in his own behalf.[63]

III. THE BURDENS OF IMPEACHMENT

The Court's analysis in *Jenkins* of the fifth amendment issue is incomplete. The majority's reliance upon the often-questioned *Raffel* decision, while omitting any meaningful discussion of the reasons for its resurrection,[64] leaves in question the continued viability of the penalty doctrine as it relates to the fifth amendment. A burden was imposed on the defendant who, in effect, had to choose between providing self-incriminating evidence to the authorities, and risking impeachment should he decide to testify at trial. Nevertheless, the Court relied upon *Raffel*, a questionable 1926 case,[65] decided long before the advent of the penalty doctrine, to support its finding that the policies underlying the privilege against self-incrimination were not appreciably impaired.

A. *Proper Construction of* Raffel

The *Raffel* decision was based on both evidentiary and constitutional grounds. Having found the questioning of the defendant about his prior silence valid for evidentiary purposes,[66] the Court was forced to address the defendant's fifth amendment claim. Noting that the safeguards against self-incrimination are only for the benefit of those who do not wish to testify in their own behalf, the Court looked to the policy underlying the privilege against self-incrimination and found no reason to extend the immunity from giving testimony to a testifying defendant.[67]

The Court's retreat from *Raffel* began in 1943 with *Johnson v. United States*.[68] In that case, Johnson testified about amounts he received from a

issue. On the fifth amendment issue, Justice Stewart joined the separate opinion of Justice Stevens. *Id.* at 245.

Justices Stevens and Stewart found no fifth amendment issue because the defendant was under no official compulsion to speak. Justice Stevens' due process argument was based on his dissent in *Doyle*, in which he maintained that the *Miranda* warnings did not contain an implied assurance that the arrestee's silence would not be used against him. 426 U.S. at 620.

62. 447 U.S. at 245 (Marshall, J. dissenting).

63. *Id.* at 254.

64. In a footnote, the Court referred to the cases that seem to question *Raffel*: United States v. Hale, 422 U.S. 171 (1975); Stewart v. United States, 366 U.S. 1 (1961); Grunewald v. United States, 353 U.S. 391 (1957). 477 U.S. at 237 n.4.

65. *See* note 26 *supra*.

66. 271 U.S. at 497-99.

67. *Id.* at 498-99.

68. 318 U.S. 189 (1943).

criminal syndicate from 1935 to 1937. When asked on cross-examination about monies received in 1938, the defendant was allowed by the Court to assert his fifth amendment privilege. Later, the prosecutor commented to the jury upon the defendant's assertion of the privilege.

The Court began its analysis in *Johnson* with the statement from *Raffel* that there is a difference between the rights of defendants who testify and those of defendants who do not.[69] The *Johnson* Court then cited Dean Wigmore's treatise on evidence[70] for the rule that an accused's voluntary testimony upon any fact is a waiver as to all other relevant facts.[71] Thus, a defendant who testifies has signified his waiver as to all facts "*except those which merely impeach his credit . . . .*"[72]

The Court in *Johnson* recognized that a defendant who testifies waives his immunity from giving testimony and that the waiver is total. Nevertheless, the Court stated that the total waiver applies only to the issues made relevant by the defendant on direct examination and not to items used solely for impeachment.[73]

The holding of *Raffel* was further restricted in *Grunewald v. United States*.[74] One of the defendants in *Grunewald* had previously refused, on the basis of his fifth amendment privilege, to answer certain questions asked of him by a grand jury. At trial, the same questions were asked of the defendant on cross-examination and were answered in a manner consistent with innocence. Subsequently, the prosecutor was allowed to bring out on cross-examination that the defendant had asserted his fifth amendment privilege as to these same questions before a grand jury.

The Court in *Grunewald* found that *Raffel* was not controlling under these circumstances,[75] because *Raffel* does not apply unless the trial testimony and the prior statement are inconsistent.[76] The *Grunewald* Court held that there was no inconsistency between the assertion of the fifth amendment privilege before a grand jury, and exculpatory testimony at trial in response to the same questions.[77] Deciding the case on evidentiary grounds, the Court expressly avoided the necessity of re-examining *Raffel* in light of *Johnson*[78] and declined to reach the constitutional issue.

In *Stewart v. United States*,[79] the Court again held that *Raffel* did not

69. *Id.* at 195; Raffel v. United States, 271 U.S. at 496-97.

70. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2276(2) (J. McNaughton rev. ed. 1961).

71. 318 U.S. at 195.

72. 8 J. WIGMORE, *supra* note 70, § 2276(2) (emphasis added).

73. 318 U.S. at 195-96.

74. 353 U.S. 391 (1957).

75. *Id.* at 418.

76. The inconsistency in *Raffel* was that the defendant remained silent at his first trial in the face of testimony that he had made an admission of guilt. This constituted a circumstance in which it would have been natural to reply. United States v. Hale, 422 U.S. at 175-76; Stewart v. United States, 366 U.S. 1; 5-6 (1961); 3A J. WIGMORE, *supra* note 32, § 1042; Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197, 204, 206 (1979).

77. 353 U.S. at 420-23.

78. *Id.* at 421. Four Justices would have overruled *Raffel*. *Id.* at 426 (Black, J., concurring).

79. 366 U.S. 1 (1961).

apply to cases where there was no inconsistency between trial testimony and statements made before trial. Stewart was charged with murder and pleaded the defense of insanity. He did not testify at this first two trials, but elected to testify at his third trial. On cross-examination, Stewart was impeached for his failure to testify at the previous trials. His testimony was characterized by the Court as gibberish,[80] consistent with his defense of insanity. Thus, there was no "testimony" to impeach and any impeachment was, therefore, solely of the defendant's demeanor.[81] The Court held that *Raffel* did not permit impeachment of solely demeanor evidence, and found that there was no inconsistency between silence (at one trial) and taking the stand at a subsequent trial.[82]

The resulting view of *Raffel* is that impeachment based on the defendant's prior silence is allowed only when there is an underlying inconsistency between the testimony and the prior statement. The prosecution is not permitted to impeach the defendant's testimony based on his prior silence solely by questioning the defendant's demeanor. This view is reflected in *United States v. Hale*,[83] in which the impeachment of the defendant's testimony based on his post-arrest silence was held invalid. The Court distinguished *Raffel*, noting that the inconsistency in *Raffel*, the failure of the accused to testify at his first trial in spite of uncontroverted testimony that he had made an admission of guilt, was not present in *Hale*.[84] Disposing of the case on evidentiary grounds, the Court did not reach the constitutional issue and again declined to re-examine *Raffel* in light of *Johnson* and *Griffin*.[85]

B. *Assertion of the Privilege*

In general, citizens have a duty to report crime to the authorities.[86] This obligation is not diminished simply because the witness to a crime is himself involved in illicit activities.[87] The obligation to assist authorities, however, is subordinate to the fifth amendment privilege against self-incrimination.[88] Generally, the privilege must be asserted by its claimant in a timely fashion because it is not a self-executing right.[89] Any claim of privilege must be presented to a tribunal for evaluation at the time disclosures are sought.[90]

An exception to the requirement that the claim be expressly asserted has developed. The assertion need not be made where it would, in itself,

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80. *Id.* at 3.
81. *Id.* at 6.
82. *Id.* at 5.
83. 422 U.S. 171 (1975). For a discussion of *Hale*, see text accompanying notes 28-37 *supra*.
84. *Id.* at 175. *See* note 76 *supra*.
85. *Id.* at 175 n.4.
86. *See* Roberts v. United States, 445 U.S. 552, 557 (1980), and authorities cited therein.
87. *Id.* 445 U.S. at 558.
88. *Id.*
89. *Id.* at 559; Garner v. United States, 424 U.S. 648, 653-55 (1976); United States v. Kordel, 397 U.S. 1, 7-10 (1970); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 78-79 (1965).
90. Garner v. United States, 424 U.S. at 653-55.

violate the claimant's privilege.[91] When some coercive factor prevents an individual from claiming the privilege or impairs his choice to remain silent,[92] the courts will forgive the usual requirement that the claim be presented for evaluation in favor of a claim by silence.[93]

Had Jenkins reported the alleged attack upon him by Redding, he would have supplied valuable evidence linking himself to the incident. He would have provided the police with evidence that he was in the right place at the right time and would have actually admitted to killing the victim. For Jenkins to have asserted the privilege, he would have had to explain to the authorities that he was a witness to a crime and was electing to exercise his privilege, thus alerting the police to the crime and making himself the prime suspect. Jenkins, then, had a right to assert the privilege and fell within the exception to the assertion rule, which excuses him from presenting his claim and allows a claim by silence.[94]

C. *Penalty Doctrine*

The fifth amendment privilege against compelled self-incrimination was incorporated into the fourteenth amendment and made applicable to the states in *Malloy v. Hogan*.[95] In so doing, the Court characterized the privilege as "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[96] One year after *Malloy*, the Court in *Griffin v. California*[97] established the rule that adverse comment by a judge or prosecutor upon a criminal defendant's failure to testify violates the fifth amendment privilege against self-incrimination. Such comment is an impermissible penalty because it "cuts down on the privilege by making its assertion costly."[98]

The proper scope and limits of the privilege are derived from an analysis of its underlying policy justifications.[99] The fifth amendment is premised on the assumption that our system of criminal justice is an accusatorial one, not an inquisitorial one.[100] The privilege protects all persons from abuse by the government of its powers of investigation, arrest, trial, and punishment.[101] Second, the privilege is designed to deter inhumane treatment whereby individuals are compelled by abusive tactics to provide self-incriminating evidence.[102] The privilege also reflects society's unwillingness to sub-

91. *See, e.g.*, Marchetti v. United States, 390 U.S. 39 (1968).
92. 445 U.S. at 560 n.6; Lisenba v. California, 314 U.S. 219, 241 (1941).
93. 424 U.S. at 658 n.11; 390 U.S. at 50.
94. *See* text accompanying notes 91-93 *supra*.
95. 378 U.S. 1 (1964).
96. *Id.* at 8.
97. 380 U.S. 609 (1965). *See* text accompanying notes 12-14 *supra*.
98. 380 U.S. at 614.
99. The purpose of the *Griffin* rule is grounded upon the whole complex of values that the privilege represents. Tehan v. United States, 382 U.S. 406, 414 (1966).
100. Malloy v. Hogan, 378 U.S. at 7-8; Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).
101. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 484 (1957).
102. Murphy v. Waterfront Comm'n, 378 U.S. at 55; *see also* E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955); 8 J. WIGMORE, *supra* note 32, § 2251; Ayer, *The Fifth Amendment*

ject criminal suspects to the "cruel trilemma of self-accusation, perjury or contempt."[103] A fourth widely-noted policy underlying the privilege is that the privilege contributes toward a fair balance between the state and the individual by requiring the government to leave the individual alone until good cause is shown for disturbing him, and by requiring the government in its contest with the individual to shoulder the *entire* load.[104]

Although the *Raffel* decision has been severely limited by subsequent decisions,[105] its fifth amendment holding has never been expressly disavowed.[106] Nevertheless, the *Raffel* Court did not consider an argument based upon a *Griffin*-type (penalty) rationale. Furthermore, the Court in *Raffel* never addressed the fourth policy justification noted above, the requirement that the government shoulder the entire load. The majority in *Jenkins* again failed to address this important policy, citing instead its discussion in *Raffel* of a defendant's right not to testify, for the proposition that *no* fifth amendment right had been impermissibly burdened.[107] By citing *Raffel*, the *Jenkins* Court made the same omission as did the Court in *Raffel*. Thus, to date, the Court has failed to employ the policy that the government must shoulder the entire load in any application of the penalty doctrine.

The rules set forth by the Supreme Court regarding the penalty doctrine are rather general, allowing either a broad or a narrow view to be taken in their application. *Malloy* and *Griffin* initiated the idea that the state violates a defendant's constitutional rights when it penalizes the defendant's assertion of those rights.[108] *McGautha* indicated that while "penalties" are impermissible, some "burdens" on constitutional rights are lawful.[109] The fact that an individual must make tough choices among constitutional rights does not constitute a penalty imposed on those rights.[110] The burden becomes a penalty only when it "impairs to an appreciable extent any of the policies behind the rights involved."[111] *Chaffin* implied that the court should consider the legitimacy of the challenged state action.[112]

An application of the above rules leads to the conclusion that impeachment of a criminal defendant's testimony based upon his prearrest silence, at least in the circumstances of the *Jenkins* case, violates the defendant's privilege against self-incrimination. The *Jenkins* majority noted that the state had at stake the important interest of ascertaining the truth.[113] This truth-find-

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and the Inference of Guilt from Silence: Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841, 849 (1980).

103. Murphy v. Waterfront Comm'n, 378 U.S. at 55; *see also* Ayer, *supra* note 102, at 849-50.

104. Tehan v. Scott, 382 U.S. 406, 415 (1966); Murphy v. Waterfront Comm'n, 378 U.S. at 55; 8 J. WIGMORE, *supra* note 70, § 2251, at 317. Ayer, *supra* note 102, at 849.

105. *See* text accompanying notes 68-85 *supra*.

106. *Hale*, *Stewart*, and *Grunewald* were all decided on evidentiary grounds using the Supreme Court's supervisory powers over the lower federal courts.

107. 447 U.S. at 235-36.

108. *See* text accompanying notes 96-98 *supra*.

109. 402 U.S. at 217; Schiller, *supra* note 76, at 213 n.96.

110. *Id.* at 214. *See* text accompanying notes 17-18 *supra*.

111. *Id.* at 213.

112. 412 U.S. at 30-33. *See* text accompanying note 19 *supra*.

113. 447 U.S. at 238.

ing function of the courts is significant, and it can at least be argued that impeachment may enhance this interest.[114] It must be remembered, however, that the privilege against self-incrimination "is not an adjunct to the ascertainment of truth."[115] The fifth amendment privilege protects more important constitutional values which reflect the concern of society that the individual be left alone.[116]

The question remains whether the impeachment through the use of prearrest silence impairs any fifth amendment policy.[117] Certainly a burden is imposed on the defendant if he refuses to come forward at the time of the incident. His silence, which may be motivated by fear,[118] an unwillingness to incriminate another, or a reliance on the right to remain silent,[119] may later be used to impeach his trial testimony should he offer an exculpatory version of events. Thus, an individual involved in a possibly criminal activity must decide immediately (for any amount of silence would supposedly be suspect) whether to remain silent and risk impeachment or to forego that right and risk almost certain self-incrimination by providing evidence to the authorities.

Requiring an individual to make such a decision, without the assistance of counsel, tips the balance in favor of the state in its contest with the individual.[120] If government is to shoulder the entire load and leave the individual unmolested in the absence of independent evidence connecting him with a crime,[121] then impeachment for failing to provide the authorities with incriminating evidence appreciably impairs this fifth amendment policy.

The loss of such impeachment evidence would not overly burden the prosecution. Impeachment evidence is, by nature, only used to assess the defendant's credibility, and the Court has noted the probative weakness of silence.[122] Furthermore, the exercise of the privilege cannot be found indicative of guilt or presumptive of perjury.[123] Since the privilege serves to protect the innocent who, like Jenkins, otherwise might be ensnared in ambiguous circumstances,[124] there is no reason to believe that only the

114. *Id.*

115. Tehan v. United States, 382 U.S. at 416.

116. *Id. See* text accompanying notes 12-19, 95-104 *supra*.

117. In addition, the *Jenkins* decision may induce defendants *not* to take the stand because of the impact on the jury of impeachment evidence, thus hindering the ascertainment of truth by depriving the court of the defendant's testimony. Comment, *The Impeachment Exception to the Exclusionary Rule*, 34 U. CHI. L. REV. 939, 944 (1967).

118. Jenkins was a black parolee, making fear a likely explanation for his silence.

119. *See* United States v. Hale, 422 U.S. at 177; Ratner, *supra* note 101, at 492-93; Schiller, *supra* note 76, at 208-09; Note, Robeson v. State: *Cross-Examination of Prearrest Silence*, 67 CALIF. L. REV. 1205, 1210-11 (1979).

120. *See generally* 8 J. WIGMORE, *supra* note 70, § 2251.

121. Ratner, *supra* note 101, at 474.

122. *See* Doyle v. Ohio, 426 U.S. at 617 n.8; United States v. Hale, 422 U.S. at 176-77. Wigmore explains that "failure to assert a fact when it would have been natural to assert it, amounts to an assertion of the non-existence of the fact." 3A J. WIGMORE, *supra* note 32, § 1042, at 1056. Silence often is of little relevence because "the inference of assent may safely be made only when no other explanation is equally consistent with silence." 4 J. WIGMORE, *supra* note 32, § 1071, at 102.

123. Slochower v. Board of Higher Educ., 350 U.S. 551, 557 (1956).

124. *Id.* at 557-58. *See also* Ullmann v. United States, 350 U.S. 422, 426 (1956).

guilty will go free due to the loss of the impeachment evidence. The prosecutor may still cross-examine the defendant on all facets of his exculpatory version as brought out on direct examination.[125] Once the defendant testifies, he must do so completely and without immunity. But the prosecutor must not be allowed to make remarks which infringe upon a defendant's constitutional rights.

CONCLUSION

The impeachment of a criminal defendant's testimony due to his prearrest silence should have been found by the *Jenkins* Court to be a fifth amendment violation. Reliance by the *Jenkins* majority upon *Raffel* was misplaced because *Raffel* applies only when there is an underlying inconsistency between the trial testimony and the prior statement and because it failed to consider an argument based on the penalty doctrine rationale. In *Jenkins*, there was no underlying inconsistency between the prearrest silence and the exculpatory version at trial.

Furthermore, *Raffel* failed to address the fifth amendment policy that the government must bear the entire burden in its contest with the individual. By relying on *Raffel* for its conclusion that no fifth amendment policy was impaired, the *Jenkins* Court also failed to address that issue. By proper application of the penalty doctrine in conjunction with the fifth amendment policy noted above, the Court should have concluded that impeachment based on prearrest silence appreciably impairs that policy.

The penalty doctrine established the principle that impeachment evidence is barred when such impeachment constitutes a penalty imposed upon the prior exercise of the fifth amendment right of silence.[126] When a defendant is compelled to make an election between constitutional rights, and the policies underlying those rights are appreciably impaired, an impermissible penalty exists. In its haste to slam the door on any further expansion of earlier, more liberal decisions, the Court failed to provide a sound analytical base for its holding.

Larry Brenman

125. Note, Robeson v. State: *Cross-Examination of Prearrest Silence*, 67 CALIF. L. REV. 1205, 1209 (1979).

126. *See* text accompanying notes 12-14 *supra*.

BASTARDIZING THE LEGITIMATE CHILD: THE COLORADO SUPREME COURT INVALIDATES THE UNIFORM PARENTAGE ACT PRESUMPTION OF LEGITIMACY IN *R.McG. v. J.W.*

INTRODUCTION

The United States Supreme Court in the last decade has raised the legal status of illegitimate children to equal that of legitimate children.[1] At the same time, the Court has elevated the rights of unwed fathers[2] and eliminated much gender-based discrimination.[3] These three disparate constitutional law trends coalesced in a ground-breaking Colorado Supreme Court decision, *R.McG. v. J.W.*[4] The combination produced a legally mandated but socially explosive result. *R.McG.* invalidated Uniform Parentage Act (UPA)[5] provisions denying standing to any man seeking to establish his paternity of a child born to a married couple that acknowledges the child as their own.[6] Thus, for the first time, a child born legitimately to a husband and wife can be bastardized by a man claiming to be the child's biological father. This comment explores the rationale and the social ramifications of the Colorado Supreme Court's decision.

I. THE FACTUAL SETTING

C.W. was born in mid-1976, at the time the mother, J.W., was having an affair with the plaintiff, R.McG. The mother's husband, W.W., was named on the birth certificate as the child's father and accepted the infant as his legitimate child.[7]

In early 1978, R.McG. filed a Declaration of Paternity in the Denver Juvenile Court on behalf of himself and the child, against the mother and her husband.[8] The complaint alleged that R.McG. was the natural father;

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1. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968). *See also* the discussion of illegitimates' rights, pp. 159-62 *infra*.

2. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972). *See also* the discussion of unwed fathers' rights, pp. 162-64 *infra*.

3. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Frontiero v. Richardson, 411 U.S. 667 (1973); Reed v. Reed, 404 U.S. 71 (1971). *See also* the discussion of men's and women's rights, pp. 164-66 *infra*.

4. 615 P.2d 666 (Colo. 1980).

5. Nine states have adopted legislation conforming to the Uniform Parentage Act. CAL. CIV. CODE §§ 7000-7018 (West Supp. 1979); COLO. REV. STAT. §§ 19-6-101 to -129 (repl. 1978 & Supp. 1980); HAWAII REV. STAT. §§ 584-1 to -26 (1976); MINN. STAT. ANN. §§ 257.51-.74 (West Supp. 1980); MONT. REV. CODES ANN. §§ 40-6-101 to -131 (1979); NEV. REV. STAT. 126.011 to .391; N.D. CENT. CODE §§ 14-17-01 to -26 (1979); WASH. REV. CODE ANN. §§ 26.26.010 to .905 (Supp. 1980); WYO. STAT. §§ 14-7-101 to -126 (1977).

6. COLO. REV. STAT. §§ 19-6-105, -107 (repl. 1978).

7. Affidavit of W.W. and J.W. in Support of Respondent's Motion for Summary Judgment, R.McG. v. J.W., 615 P.2d 666 (Colo. 1980).

8. Necessary parties under Colorado law include the child, the natural mother, and each presumed father, as well as each man alleged to be the natural father who is subject to the

that he was the only man who had had sexual intercourse with the mother at any possible time of conception; that the mother admitted he was the natural father; and that blood tests were unable to exclude him as the natural father.

The defendants denied R.McG.'s allegations and moved for summary judgment on the ground that the plaintiff lacked standing to bring the action under the UPA.[9] In their motion for summary judgment, the defendants relied on a UPA provision[10] denying standing to all but the mother, the legally presumed father—in this case, the husband, W.W.—and their lineal descendants. Discrimination against third-party fathers is justified, the defendants claimed, due to the compelling state interest in keeping family units intact.[11] The husband's accompanying affidavit stated that he believed himself to be the natural father; that regardless of the outcome of the suit, he would continue to treat the child as his natural offspring; and that he had the desire and ability to continue providing for the child's support, nourishment, protection, and care.[12] The mother filed a similar affidavit.[13]

R.McG. opposed summary judgment, claiming that the denial of his standing to bring the action violated his right to equal protection under the United States and Colorado Constitutions and under Colorado's equal rights amendment.[14] In his affidavit opposing summary judgment, R.McG. further maintained that the mother acknowledged his paternity in a sworn codicil to her will and in correspondence, and that the child had visited with him almost daily until she was one-and-a-half years old.[15]

Before hearing the motion for summary judgment, the juvenile court appointed a guardian *ad litem* for the child,[16] and approved the plaintiff's request that Human Leukocyte Antigen (HLA) blood tests be administered to the parties.[17] The test results showed a 98.89% probability of R.McG.'s paternity.[18] No results were obtained for the husband, because an initial blood sample was defective and he refused to submit to further tests.

The juvenile court referee then rejected the plaintiff's constitutional claims and granted the motion for summary judgment, holding that third-party fathers have no capacity to sue under the UPA.[19] The referee was

court's jurisdiction. COLO. REV. STAT. § 19-6-110 (repl. 1978). For a definition of "presumed father," *see* note 70 *infra*.

9. 615 P.2d at 668.

10. COLO. REV. STAT. § 19-6-107(1) (repl. 1978).

11. Memorandum Brief in Support of Respondent's Motion for Summary Judgment at 9, 10.

12. Affidavit of W.W. in support of Respondent's Motion for Summary Judgment at 1.

13. Affidavit of J.W. in Support of Respondent's Motion for Summary Judgment at 1.

14. 615 P.2d at 668-69. Applicable provisions of the United States Constitution, the Colorado Constitution, and Colorado's equal rights amendment are set forth in notes 24-26 *infra*.

15. 615 P.2d at 668. In the codicil, J.W. swore that her present husband could not be the father and that to the best of her knowledge R.McG. was the father. She requested that R.McG. be appointed the child's guardian if she were to die while the child was still an unmarried minor. *Id.*

16. As provided in COLO. REV. STAT. § 19-6-110 (repl. 1978).

17. As provided in COLO. REV. STAT. § 19-6-112 (repl. 1978) and § 13-25-126 (1973 & Supp. 1980). 615 P.2d at 668.

18. *See* note 134 *infra* and accompanying text.

19. 615 P.2d at 669.

unwilling to allow the "turmoil and heartache" which would follow a judicial declaration that the child was conceived of an adulterous relationship.[20] The referee's order was subsequently confirmed by the juvenile court judge.[21] The plaintiff appealed and the Colorado Court of Appeals transferred the case to the Colorado Supreme Court because of the constitutional issues involved.[22]

The Colorado Supreme Court reversed the summary judgment order and invalidated the UPA's standing provisions.[23] The court held that under the circumstances of this case, the UPA's failure to grant R.McG. the right to sue for a determination of his paternity violated equal protection of the laws, under the federal[24] and state constitutions[25] and the equal rights amendment to the Colorado Constitution.[26]

II. THE BACKGROUND ISSUES

At common law, illegitimacy bore a tremendous stigma. The law made every presumption[27] in favor of legitimacy to protect children from that legal and social void. Gradually, the courts and legislatures removed many of the disabilities imposed upon those born out of wedlock. In *R.McG.*, the Colorado Supreme Court took the final step by holding that a legitimate child could be declared illegitimate.[28] This step represented a giant leap from the common law, but only a small step from recent United States Supreme Court decisions.[29] To understand the evolutionary nature of the step taken in *R.McG.*, the historical development of the rights accorded to three groups—illegitimates, unwed fathers, and men and women—needs to be explored.

A. *The Rights of Illegitimates*

1. Under State and Common Law

In the past, the child born to an unmarried mother fell into a legal void. He was known at common law as *filius nullius*, "the son of no one," or *filius*

20. Order of Referee Rogers, Apr. 23, 1979, Record at 156.

21. Order of Judge Lawritson, Oct. 9, 1979, Record at 190.

22. COLO. REV. STAT. § 13-4-110(1)(a) (1973) provides for the transfer of cases to the Colorado Supreme Court.

23. 615 P.2d at 667, 671-72.

24. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

25. "No person shall be deprived of life, liberty or property, without due process of law." COLO. CONST. art. II, § 25.

26. "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex." COLO. CONST. art. II, § 29. Colorado's due process clause, *id.* § 25, has been construed to include equal protection of the laws. *See* Vanderhoof v. People, 152 Colo. 147, 380 P.2d 903 (1963); Trueblood v. Tinsley, 148 Colo. 503, 366 P.2d 655 (1961); People v. Max, 70 Colo. 100, 198 P. 150 (1921).

27. One of these presumptions is Lord Mansfield's Rule. *See* notes 128-133 *infra* and accompanying text.

28. Technically, under the Colorado UPA, the terms "legitimate" and "illegitimate" should not be used since the statute does not use that terminology.

29. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 667 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

populi, "the son of the people."[30] He was considered a ward of the village parish, and neither his parents nor anyone else was required to support him. He could neither inherit from his parents nor be legitimated by them.[31] Christianity, with its emphasis on monogamous marriages, likewise rated him a non-entity.[32] The first statute according some status to illegitimates was the English Poor Law Act of 1576, which imposed on both parents a duty of support.[33] The law was not drafted out of concern for the children, whose legal status remained in limbo; rather, it was an effort to relieve the parishes of the financial burden of caring for them.[34]

2. Under United States Supreme Court Decisions

The United States initially adopted the common law *filius nullius* doctrine and accorded the illegitimate no rights.[35] By the early 1960's, compassion and social justice had brought about legislation in some states that tempered the legal impact of illegitimacy and further equalized the rights of children.[36] But many inequities remained until the United States Supreme Court began invalidating discriminatory state statutes in 1968. In that year the Court held that a state may not create a right of action in favor of children for the wrongful death of a parent, yet exclude illegitimate children from such a right.[37] Subsequently the Court has held that illegitimate children may not be precluded from sharing equally with other children who recover workmen's compensation benefits for the death of a parent,[38] and that illegitimates are not to be denied the child's right to support from his natural father.[39] In *Gomez v. Perez*,[40] the Court emphasized that "a State may not invidiously discriminate against illegitimate chidren by denying them substantial benefits accorded children generally."[41]

More recently, the Supreme Court has recognized that some statutory

30. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 246, 190 N.E.2d 849, 856 (1963), *cert. denied*, 379 U.S. 945 (1964).

31. 1 W. BLACKSTONE, COMMENTARIES 459 (1772).

32. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 1 (1971) [hereinafter cited as KRAUSE]. Biblical aversion to the bastard predates Christ: "A bastard shall not enter into the congregation of the Lord; even to his tenth generation . . . ." *Deuteronomy* 23:2.

33. S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS § 1.08, at 1-28, § 1.09, at 1-30 (4th rev. ed. 1975).

34. *Id.*

35. 1 W. BLACKSTONE, COMMENTARIES § 485 (1772). At common law, the doctrine of *filius nullius*

> expresses no mere technical uncertainty as to the fatherhood of the bastard, but rather the moral antipathy, inculcated by the Church, to the irregular intercourse of which he was the fruit. The Common Law might take note sometimes of the maternal ties of blood but refused to follow the Civil Law in making them a conduit for inheritable rights, and conferring on the issue of irregular unions a quasi-legitimacy as regards the mother.

W. HOOPER, THE LAW OF ILLEGITIMACY 27 (1911). *See generally id.* at 100-24; KRAUSE, *supra* note 32, at 9-57.

36. *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

37. Levy v. Louisiana, 391 U.S. 68 (1968).

38. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

39. Gomez v. Perez, 409 U.S. 535 (1973).

40. 409 U.S. 535 (1973).

41. *Id.* at 538.

classifications are necessary to protect overriding state concerns, such as protecting estates from fraudulent claims by alleged illegitimate offspring.[42] Consequently, the Court has wrestled with the technical proofs of parenthood that may be legally required.[43] In a recent case, *Lalli v. Lalli*,[44] the Court by a five-to-four decision, upheld a New York statutory scheme requiring that certain evidence of paternity exists before a natural father's death, if his offspring seek to inherit intestate from him. The Court stressed that only an important state interest justifies statutory discrimination against illegitimates: "Although . . . classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."[45]

3. Under the Colorado Uniform Parentage Act

State legislation generally has not kept pace with the Supreme Court decisions; substantial discrimination persists.[46] Two early uniform acts were not well received and were withdrawn by the National Conference of Commissioners on Uniform State Laws.[47] In a 1966 article,[48] Professor Harry D. Krause of the University of Illinois College of Law sparked interest in a new effort at uniform legislation. The result was the Uniform Parentage Act (UPA) of 1973. Substantially similar legislation has been enacted by nine states since 1975.[49] Colorado's version of the UPA went into effect in 1977. Because the UPA has been adopted for only a few years in a small number of states, little case law has developed.

The UPA's primary goal is to bring substantive legal equality to all children regardless of the marital status of their parents. The concept is a revolutionary one.[50]

The substance of the UPA is expressed in the first two sections. First, the Act defines the parent-child relationship as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations."[51] Second, the Act specifies that the parent-child relationship includes both mother-and-child and father-and-child relationships, and extends equally to

42. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978).

43. *See* Parham v. Hughes, 441 US. 347 (1979); Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Labine v. Vincent, 401 U.S. 532 (1971).

44. 439 U.S. 259 (1978).

45. *Id.* at 265.

46. *See generally* KRAUSE, *supra* note 32, at 297-305. *See also* Wills, *Paternity Statutes: Thwarting Equal Protection for Illegitimates*, 32 U. MIAMI L. REV. 339 (1977).

47. The Uniform Illegitimacy Act of 1922 and the Uniform Paternity Act of 1960, 9A UNIFORM LAWS ANNOTATED 579 (1979). Note the names of the three acts, which changed as society's consciousness was raised—from "Illegitimacy" to "Paternity" to "Parentage."

48. Krause, *Bringing the Bastard into the Great Society: A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966).

49. *See* note 5 *supra*.

50. 9A UNIFORM LAWS ANNOTED 580 (1979).

51. COLO. REV. STAT. § 19-6-102 (repl. 1978).

every child and to every parent, regardless of the parents' marital status.[52]

The remainder of the Act deals primarily with standing requirements. Before *R.McG.*, a man who claimed parental rights faced differing standing and statute of limitation rules, depending on whether the child had a "presumed father" as defined by the Act.[53] R.McG. challenged the validity of these separate classifications.

B. *The Rights of Unwed Fathers*

1. Under State and Common Law

When American states adopted the common law doctrine of *filius nullius*, the unwed father[54] was treated as having, at most, a moral obligation to provide support.[55] He owed no legal duty; he received no visitation rights.[56] The first changes in the law imposed duties of support, in an effort to relieve welfare rolls, but conferred no attendant rights.[57] More recently, legitimation statutes have allowed the natural father to alter the child's status by openly acknowledging him, and thence to acquire visitation, and even custody, rights.[58]

2. Under United States Supreme Court Decisions

The United States Supreme Court first recognized an unwed father's parental rights in *Stanley v. Illinois*,[59] a 1972 decision. Under an Illinois statute, minor illegitimate children automatically became wards of the state if their mothers died. Although Stanley had never formally legitimated his children, he had always acknowledged them as his own and had lived with the mother intermittently over a period of eighteen years. In ruling the statute unconstitutional, the Court held that before a custody decision is made, due process entitles the unwed father to a hearing on his fitness as a parent.[60] The Court decided the statute made an impermissible, irrebutable presumption that all unmarried fathers are unsuitable.[61] The statute also violated

52. *Id.* §§ 19-6-102, -103.

53. *See* note 70 *infra* and accompanying text.

54. All fathers who are not married to their child's mother are termed "unwed fathers." They may also be called "non-marital fathers." The term "putative father" is often used interchangeably, but should be restricted to its definition: "the alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979). Thus R.McG. is technically not a putative father because his child is legitimate. He is more correctly called a "claiming natural father" or a "third-party father." These latter two terms were used by the court in the instant case, but do not adequately express R.McG.'s status in relation to the mother's husband. The fact that the law has no precise term for such would-be fathers indicates how new these rights really are. This author favors coining the new term "extra-marital father" for a man who claims to be the natural father of a child born to a married couple when both the mother and her husband acknowledge the child as their natural offspring.

55. Note, *Father of an Illegitimate Child—His Right to be Heard*, 50 MINN. L. REV. 1071, 1072 (1966).

56. *Id.*

57. *See generally* W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS § 8 (3rd ed. 1978).

58. *Id.*

59. 405 U.S. 645 (1972).

60. *Id.* at 649.

61. *Id.* at 656-57.

the equal protection rights of such fathers, because other similarly situated parents were accorded the opportunity for a hearing.[62]

Stanley produced much academic and legislative debate over the proper extent of these newly found rights. Some commentators interpreted the decision narrowly as a procedural due process case which required only notice and a hearing before parental rights could be terminated.[63] Others interpreted it broadly as a substantive due process case requiring unwed fathers to be given the same rights as all other parents.[64] The debate was illuminated—but not resolved—by subsequent cases. Six years after *Stanley*, in *Quilloin v. Walcott*,[65] the Court, utilizing the "best interests of the child" test, upheld the involuntary termination of an unwed father's parental rights after notice and a hearing.[66] More recently, in *Caban v. Mohammed*,[67] the Court, in reaffirming the rights of unwed fathers who have established a substantial relationship with their children, used equal protection analysis to strike down a New York adoption statute which set different standards for unwed mothers and fathers.[68] *Quilloin* lends support to the procedural due process interpretation of *Stanley*, while *Caban* supports the substantive due process analysis.

3. Under the Colorado Uniform Parentage Act

After *Stanley* and its progeny, there was no longer any doubt that the Supreme Court included responsible unwed fathers when it declared that parents have a basic right to their natural children.[69] However, the UPA was based on a wholly different premise.

The UPA set up two categories of fathers with different rights: first, "presumed natural fathers" who were married to the child's mother at the time of conception, or who performed some overt act of acknowledgement later; second, all other fathers.[70] If a child had a presumed father, another man could assert his paternity only if he had the written consent of the pre-

62. *Id.* at 649.

63. *See, e.g.*, Comment, *Limiting the Boundaries of* Stanley v. Illinois, 57 DEN. L.J. 671 (1980).

64. *See, e.g.*, Comment, *The Unwed Father's Rights in Adoption Proceedings: A Case Study and Legislative Critique*, 40 ALB. L. REV. 543 (1976).

65. 434 U.S. 246 (1978).

66. *Id.* at 256.

67. 441 U.S. 380 (1979).

68. *Id.* at 391.

69. The rights to conceive and to raise one's children were deemed essential in Meyer v. Nebraska, 262 U.S. 390, 399 (1923); they were considered among the "basic civil rights of man" in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). For a good review of these and other cases, *see* Note, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 WASH. U.L.Q. 1029. *See also* Comment, *Equal Protection and the Putative Father: An Analysis of* Parham v. Hughes *and* Caban v. Mohammed, 34 SW. L.J. 717 (1980).

70. COLO. REV. STAT. § 19-6-105 (repl. 1978). The UPA presumptions are complex. Briefly, a man is presumed to be the natural father if he meets one of the following five conditions: 1) The child is born or conceived during the father's marriage to the mother; 2) the child is born or conceived during the father's cohabitation with the mother, after an attempt to marry ceremonially, even though the marriage could be invalidated; 3) the child is born before the father's marriage to the mother, and the father files a written acknowledgment of paternity, or is voluntarily named as the father on the birth certificate, or is obligated to support the child under a written voluntary promise or by court order; 4) the father receives the minor child into his home and openly holds him out as his natural child; 5) the father files a written acknowl-

sumed father, or if the presumption of paternity had been rebutted by someone else.[71] Standing to rebut the presumption was granted only to the presumed father, the natural mother, and their lineal descendants.[72] Thus, if the mother was married, an unwed father was realistically unable to prove his paternity without the concurrence of one of the legal parents. Whenever there was a harmonious family unit, as was the case in *R.McG.*, an extramarital father could not establish his rights under the UPA.[73]

This dual scheme was a deliberate move by the drafters, who sought to protect the legitimacy of children born in wedlock.[74] Although it reflected an appropriate state interest in maintaining the integrity of family units, it quite obviously discriminated against certain unwed fathers.

C. *Equal Rights for Men and Women*

1. Under State and Common Law

Western society's patriarchial culture has traditionally imposed significant legal and social disabilities on women. Women were long forbidden to vote and were denied educational and employment opportunities.[75] English law treated a married woman particularly badly—her husband controlled her property, her contracts, her debts, her will, and her testimony.[76] The first women's movement, in the mid-19th century, resulted in married women's property acts in many states, which granted all women the right to contract, to bring suit, and to sell their property.[77] Even these seemingly innocuous rights did not gain nationwide acceptance, however. As late as

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edgment of paternity with the court which is not disputed by the mother. COLO. REV. STAT. § 19-6-105 (repl. 1978).

71. COLO. REV. STAT. §§ 19-6-105(1)(e), -105(2) (repl. 1978).

72. *Id.* § 19-6-107. Before the UPA was adopted in Colorado, fathers had no statutory right to establish their paternity. Standing was granted only to mothers, guardians, and local welfare agencies. *Id.* The Colorado UPA gave standing to certain categories of fathers. *Id. See* People *ex rel.* L.B. 29 Colo. App. 101, 482 P.2d 1010 (1970), *aff'd*, 179 Colo. 11, 498 P.2d 1157 (1972), *appeal dismissed mem.*, 410 U.S. 976 (1973).

73. In the R.McG. case, the court dismissed the action without prejudice, to preserve the child's right to bring suit at a later time. However, the court denied a motion by the guardian *ad litem* to continue to pursue the suit because this would allow the claiming father to accomplish indirectly what he could not accomplish directly. Order of Judge Lawritson, Oct. 9, 1979, Record at 190. Hence, it is also unlikely that courts will allow putative fathers access under the UPA through a suit brought by a descendant.

74. 9A UNIFORM LAWS ANNOTATED 594 (1979); Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1 (1974). The views of Krause, the Act's reporter-drafter, were clear even before the Act was formulated:

> In the best interests of the child born illegitimately to a *married* mother, pursuing its true paternity would not be indicated, unless the mother's husband has disavowed paternity. For the same reason (protection of the family) that continues to support the presumption of legitimacy of children born to a married mother, an illegitimate father's claim to his child born 'legitimately' to a married mother should not be heard—unless the mother's husband has disavowed paternity or consented to the legitimation of the child by its actual father.

KRAUSE, *supra* note 32, at 97 (footnotes omitted). For a discussion recognizing the inherent inequity of the policy, *see* Note, *The Uniform Parentage Act: What It Will Mean for the Putative Father in California*, 28 HASTINGS L.J. 191 (1976).

75. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

76. *See generally* W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS § 5 (3rd ed. 1978); G. GUNTHER, CONSTITUTIONAL LAW § 3(c) (9th ed. 1975).

77. Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

1977, Alabama still forbade married women to convey or to mortgage their real estate without the consent of their husbands.[78]

The nineteenth amendment to the United States Constitution, passed in 1920, gave women equal voting rights; full constitutional equality, however, awaits passage of the equal rights amendment. The proposed twenty-seventh amendment, which states that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," has sparked bitter controversy and has yet to be ratified by the requisite number of states.[79]

2. Under United States Supreme Court Decisions

For many years, the United States Supreme Court used a two-tier approach to judge the validity of statutes challenged under the equal protection clause of the fourteenth amendment. Most statutes, falling into the traditional "lower tier," were required merely to bear some "rational relationship" to a legitimate state end and were invariably upheld.[80] The "upper tier" test, which required justification by a "compelling state interest," was imposed upon statutes restricting fundamental rights and creating suspect classifications such as race.[81] Statutes subject to the latter tests were most often invalidated, because they failed to fulfill the "strict scrutiny" requirement that there be a compelling government interest unable to be achieved by less restrictive alternatives.[82]

Until recently, gender-based statutes were generally upheld because they were subjected only to the lower tier, rational relationship test.[83] In 1971, however, the Court radically changed its position in *Reed v. Reed*,[84] where it invalidated a statute which gave preference to men over women as administrators of decedents' estates. Two years later, in *Frontiero v. Richardson*,[85] four members of the Court voted to elevate gender to the status of a suspect classs, but the idea never gained majority support. Instead, what has emerged is a strong, middle-tier standard under which many discriminatory schemes have been invalidated. The new "substantial relationship" test requires that gender classes serve important government objectives, that their purpose be both identifiable and substantial, and that the distinction be reasonably structured so that all persons similarly situated are treated alike.[86]

78. The Alabama statute was ruled unconstitutional, over a scathing dissent, in Peddy v. Montgomery, 345 So. 2d 631 (Ala. 1977).

79. Three more states are needed to ratify the amendment before the June 30, 1982 deadline. NEWSWEEK, July 13, 1981, at 24, col. 1.

80. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961).

81. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

82. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

83. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled*, Craig v. Boren, 429 U.S. 190 (1976).

84. 404 U.S. 71 (1971).

85. 411 U.S. 677 (1973).

86. *E.g.*, Personnel Adm'r of Mass. v. Feeny, 442 U.S. 256 (1979); Caban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Orr v. Orr. 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). *See* Comment, *Equal Protection and the "Middle Tier": The Impact on Women and Illegitimates*, 54 NOTRE DAME LAW. 303 (1978).

Initially, the Court seemed unwilling to apply this middle tier, heightened scrutiny to strike down statutes that discriminated against men rather than against women.[87] Recent cases have shown a more even-handed approach, unless the challenged statute is clearly an ameliorative measure aimed at correcting past discrimination.[88] The 1979 *Caban v. Mohammed*[89] decision, which rested on gender-based equal protection grounds, exemplifies the more recent trend. In *Caban*, the Court found the statute to be another example of overbroad generalizations in gender-based classifications, the effect of which is to discriminate impermissibly against unwed fathers while according rights to similarly situated mothers.[90] This undifferentiated distinction, the Court maintained, does not bear a substantial relationship to the state's asserted interests.[91]

3. Under the Colorado Equal Rights Amendment (ERA)

Colorado's ERA states that equality of rights under the law cannot be denied on account of sex.[92] The amendment, which became part of the state constitution in early 1973, was first applied in *People v. Green*.[93] Although the Colorado Supreme Court upheld the rape statute challenged in that case, the court ruled that the ERA requires application of the strict scrutiny test to all such gender-based statutes.[94] Thus, in Colorado, gender-based classifications challenged on equal protection grounds must meet the strictest judicial test.[95]

III. THE INSTANT CASE

The Colorado Supreme Court's three opinions in *R.McG.* clearly reflect the three currently popular legal viewpoints regarding the right of unwed fathers to seek parental rights to a legitimate child. The majority, utilizing equal protection analysis, found that the statute was invalid because it impermissibly discriminated between natural mothers and claiming natural fathers.[96] The concurring opinion analyzed the father's rights in terms of procedural due process safeguards. The dissent found both arguments overridden by the compelling state interest in fostering harmonious legal family units.

87. *E.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

88. *E.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (granting rights to unwed fathers); Orr. v. Orr, 440 U.S. 268 (1979) (invalidating statute requiring only husbands to pay alimony); Craig v. Boren, 429 U.S. 190 (1976) (invalidating statute prohibiting beer sales to males under 21 and females under 18).

89. 441 U.S. 380 (1979). *Caban* was the first unwed father case to face directly the equal protection issues. The Court in Quilloin v. Walcott, 434 U.S. 246 (1978), had refused to consider gender-based issues raised in the brief because they were not in the jurisdictional statement. *Id.* at 253 n.13.

90. 441 U.S. at 394.

91. *Id.*

92. *See* note 26 *supra*.

93. 183 Colo. 25, 514 P.2d 769 (1973).

94. *Id.* at 28, 514 P.2d at 770.

95. *Id.*

96. *See* note 54 *supra*.

A. *The Majority: Equal Protection Rights*

Justice Quinn's majority opinion first recognized the important state interest involved in preserving family harmony,[97] and then proceeded to weigh that interest against the UPA's gender-based classification, under the intermediate standard of judicial scrutiny used in *Caban v. Mohammed*.[98] Here, the court found that the challenged UPA provision created more than a difference in treatment; it created diametrically opposite treatments.[99] A natural mother can sue a non-spousal father for paternity and disrupt the father's family harmony, even if, as in this case, he is married to someone else and has other children. Claiming natural fathers, on the other hand, are not allowed to disrupt a married mother's family harmony by suing her to claim parental rights. According to the court, such a gender-based classification is precisely the kind of overbroad generalization invalidated in *Caban* and in *Stanley*.[100] The court distinguished *Quilloin v. Walcott*[101] by noting that the father in that case had never sought custody yet was still accorded a full hearing.[102]

Although the UPA states that all its presumptions are rebuttable by clear and convincing evidence,[103] the court noted that for fathers like R.McG. (even with a threshold showing of 98.89% probability of his paternity), the presumption in favor of the mother's husband is actually irrebuttable because such extra-marital fathers are precluded from suing. According to the majority in *R.McG.*, such a presumption is impermissible under the *Stanley* doctrine.[104] Equal protection doctrines under both the United States and Colorado Constitutions[105] mandate equal judicial access for natural mothers and claiming natural fathers. Justice Quinn concluded that since the statute failed to satisfy the intermediate level of judicial scrutiny, it also failed to satisfy the stricter judicial scrutiny demanded by the Colorado equal rights amendment,[106] and by *People v. Greene*.[107]

The majority rejected the defendants' due process right of privacy

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97. 615 P.2d at 670.

98. The standard used in *Caban* is as follows:

> [T]he unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction. . . . Rather, under the relevant cases applying the Equal Protection Clause it must be shown that the distinction is structured reasonably to further these ends. . . . [S]uch a statutory classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 [(1920)].

Caban v. Mohammed, 441 U.S. at 391.

99. 615 P.2d at 671.

100. *Id.*

101. 434 U.S. 246 (1978).

102. 615 P.2d at 671.

103. COLO. REV. STAT. § 19-6-105(2) (repl. 1978).

104. The court quoted *Stanley* for the proposition that "when that procedure forecloses the determinative issues . . . [and] explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child." 615 P.2d at 671.

105. *See* notes 24, 25 *supra*.

106. 615 P.2d at 672.

107. 183 Colo. 25, 514 P.2d 769 (1973).

claims, stating that the interest they might have in protecting their family harmony was no greater than the interest of R.McG. in establishing his paternity, and the interest of the child in determining his or her biological parentage.[108] The court recognized that continuing the action could disrupt the mother's marriage and negatively influence the child's life; however, the court also acknowledged that the best interests of the child are not necessarily the same as those of the legal parents, and that these interests are extremely difficult to determine.[109]

Thus, the majority held that if a natural mother is allowed to sue for a Declaration of Paternity in cases where the child has a presumed father, a claiming natural father must be given the same opportunity.[110] The court reversed the lower court's summary judgment and remanded the case to the juvenile court.[111]

B. *The Concurrence: Due Process Rights*

Justice Dubofsky's special concurring opinion relied on due process, in treading a middle path between the majority and the dissent. She stated that the legislature may give preference in paternity proceedings to a mother's family unit in which the child resides, without violating equal protection guarantees.[112] This permissible preference, however, does not justify the statute's strong presumption of legitimacy. Due process requires that putative fathers have access to the courtroom, since *Stanley* held that a fit natural father has a due process right to maintain a parental relationship with his illegitimate child.[113]

In order to determine the unwed father's due process rights, Justice Dubofsky weighed the unwed father's expressions of interest in the child against the state's interest in protecting the integrity of the family unit.[114] Had the father not made continuing efforts to maintain contact and support the child, the state's interest would have prevailed:

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108. 615 P.2d at 672. The opinion cites *Caban*, *Stanley*, and *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475, *cert. denied*, 421 U.S. 1014 (1975). The *Lisa R.* case held CAL. EVID. CODE § 661 (West 1966) constitutionally defective because it denied the use of the courts to an unwed father seeking to establish his parenthood of a minor child whose legal parents had died. The California Supreme Court found this denial of access to be unreasonable, arbitrary and capricious, as well as a violation of due process rights. 13 Cal.3d at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485. Subsequently, the state legislature replaced the statute with a UPA provision granting standing to a wide range of persons, including putative fathers. CAL. CIV. CODE § 7008 (West Supp. 1981). *See* Comment, *In Re* Lisa R.—*Limiting the Scope of the Conclusive Presumption Doctrine*, 13 SAN DIEGO L. REV. 377 (1976); Note, *In Re* Lisa R., 3 PEPPERDINE L. REV. 212 (1975).

109. 615 P.2d at 672.

110. *Id.*

111. On remand the Denver Juvenile Court entered a Declaration of Paternity in favor of R.McG., following a stipulation to that effect by the mother and the presumed father. R.McG. v. J.W., No. P-20082 (Den. Juv. Ct. Order, May 1981).

112. 615 P.2d at 672-73 (Dubofsky, J., concurring).

113. *Id.* at 673. The concurring opinion also recognized *Lisa R.*, as persuasive authority for this proposition. *See* note 108 *supra*.

114. The due process cases on which Justice Dubofsky relied are Board of Regents v. Roth, 408 U.S. 564 (1972); Hannah v. Larche, 363 U.S. 420 (1960); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

> But here, where R.McG. has no alternative remedy to protect his interest as the child's natural father, I think we must find that he has standing to assert those interests in a court proceeding. Otherwise, his constitutional right to due process of law in order to protect his basic right to conceive and raise his child has been denied.[115]

C. *The Dissent: Overriding State Interests*

Justice Lohr's dissent found both equal protection and due process arguments outweighed by the compelling state interest in fostering harmonious marital relationships and strong family ties.[116] The dissent began by quoting the purposes of the Colorado Children's Code[117] (of which the UPA is a part): to serve the best interest of the child and to strengthen the family.[118] Justice Lohr maintained that UPA presumptions of paternity faithfully implement these declared legislative purposes which must be liberally construed under the statute.[119]

Justice Lohr, addressing the equal protection issue, stated that no prior court has ever extended the *Stanley* doctrine to find that a man other than the mother's husband possessed an interest in determining the parental status of a child born in wedlock.[120] The dissenting Justice, noting that adultery is still a crime in Colorado, stated, "it requires more imagination than I can summon to find any legitimate expectation of a legally recognized relationship based solely on the blood ties between the child conceived of an adulterous relationship and the natural father of that child."[121]

According to the dissent, the appropriate judicial standard for testing R.McG.'s claims is the lower tier, rational relationship test, under which the challenged classification would prevail.[122] For example, when family relationships become so disintegrated that someone within the family wishes to challenge the husband's paternity, the legislature could reasonably determine that no useful purpose would be served by preventing that person from doing so.[123] Justice Lohr rejected the majority view that the challenged classification was gender-based, since both sexes are among persons able to sue in paternity proceedings. Therefore, he declined to apply the higher level of scrutiny demanded for gender-based statutes[124] and, further, found it unnec-

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115. 615 P.2d at 673-74 (Dubofsky, J., concurring).

116. *Id.* at 674-75 (Lohr, J., dissenting).

117. *Id.* at 674; COLO. REV. STAT. § 19-1-102 (repl. 1978 & Supp. 1980). For cases implementing these policies, *see* R.M. v. District Court, 191 Colo. 42, 550 P.2d 346 (1976); People *ex rel.* M.M., 184 Colo. 298, 520 P.2d 128 (1974). *See also* People *ex rel.* S.S.T., 38 Colo. App. 110, 553 P.2d 82 (1976).

118. COLO. REV. STAT. § 19-1-102(1)(a), -102(1)(b) (repl. 1978).

119. 615 P.2d at 674 (Lohr, J., dissenting).

120. *Id.* at 676.

121. *Id.*

122. *Id.* The two Colorado cases upon which Justice Lohr relied are Mosgrove v. Town of Federal Heights, 190 Colo. 1, 543 P.2d 715 (1975) and People *ex rel.* L.B., 179 Colo. 11, 498 P.2d 1157 (1972), *appeal dismissed mem.*, 410 U.S. 976 (1973).

123. 615 P.2d at 676 (Lohr, J., dissenting).

124. *Id.* at 677. Justice Lohr stated that if he were to utilize the substantial interest test, the classification would still survive. *Id.*

essary to apply the Colorado equal rights amendment.[125]

Turning to the concurring due process arguments, Justice Lohr applied the same balancing test as Justice Dubofsky had, but he reached the opposite result, finding that public policy considerations outweighed the private interests of the extra-marital father in this case.[126] To Justice Lohr "the important criteria would be the duration and quality of the relationship of the parties, not the probability that the third-party father could in fact prove paternity."[127]

IV. THE SOCIAL CONSIDERATIONS

The presumption that a child conceived during a lawful marriage is legitimate is one of the oldest and strongest presumptions in Anglo-American law.[128] It was long supported by an evidentiary rule which rendered a husband and wife incompetent to rebut the presumption by testifying that they had not engaged in sexual intercourse at the time of conception. The precept became known as Lord Mansfield's Rule after the English peer articulated it in a 1777 ejectment case, declaring that "decency, morality, and policy" required that husbands and wives be barred from bastardizing their offspring.[129]

Some American states continue to employ a conclusive presumption of legitimacy. For instance, in 1967 a California appellate court held that a mixed race child born to a Caucasian woman was the legitimate child of the mother's Caucasian husband.[130] Other state laws contain a rebuttable presumption of legitimacy, yet make rebuttal quite difficult.[131] Colorado rejected Lord Mansfield's Rule in 1959, but continues to uphold the strong presumption of legitimacy.[132] Just four months before the *R.McG.* decision, in fact, the Colorado Supreme Court held that children with married parents enjoy a strong presumption of legitimacy and should be able to rely on it absent a paternity challenge by the presumed father.[133]

R.McG. has not destroyed the traditional presumption of legitimacy in Colorado, but has severely weakened it. The presumption still exists; however, any extra-marital father—indeed, probably any interested person—may now attack it.

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125. *Id.*

126. *Id.* at 677-78.

127. *Id.* at 678. Justice Lohr referred to Justice Stewart's dissent in *Caban*, in which the latter stated, "[p]arental rights do not spring full blown from the biological connection between parent and child. They require relationships more enduring." 615 P.2d at 678 n.9 (citing Caban v. Mohammed, 441 U.S. at 397 (Stewart, J., dissenting)).

128. In *In re* Findlay, 253 N.Y. 1, 170 N.E. 471 (1930), Justice Cardozo said the presumption could not fail unless common sense and reason are outraged by it. For a good general discussion, *see* Note, *Evidence—Incompetency of a Husband and Wife to Testify as to Nonaccess so as to Bastardize a Child*, 6 GA. ST. B.J. 448 (1970).

129. Goodright v. Moss, 98 Eng. Rep. 1257, 1257-58 (K.B. 1777).

130. Hess v. Whitsitt, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (1967). *Accord*, *In re* Marriage of A., 41 Or. App. 679, 598 P.2d 1258 (1979).

131. *E.g.*, Stewart v. Stewart, 91 Mich. App. 602, 283 N.W.2d 809 (1979).

132. Vasquez v. Esquibel, 141 Colo. 5, 346 P.2d 293 (1959). *See also* Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963); Lanford v. Lanford, 151 Colo. 211, 377 P.2d 115 (1962).

133. A.G. v. S.G., 609 P.2d 121 (Colo. 1980).

Such an attack today has a much greater chance of success than ever before. Just a few years ago, a true natural father in R.McG.'s situation probably would have lost his case, even if he could have obtained standing to bring the action to trial, because he could have mustered little scientific evidence to rebut the strong presumption of legitimacy. The blood tests then available were often inconclusive and only excluded certain fathers; they did not definitely establish paternity. Today, however, the new HLA tissue testing procedure has made it possible to determine paternity much more accurately. In approximately 90% of blood samples tested, the HLA procedure either absolutely excludes the tested party as the father, or rates his probability of paternity at over 90%.[134] Such evidence should be sufficient to rebut any presumption except a legally conclusive one. The Colorado Supreme Court was obviously influenced by what it called R.McG.'s "threshold showing of 98.89% probability of paternity."[135]

Thus, before HLA testing existed, the rebuttable presumption of legitimacy acted as an almost insurmountable barrier to extra-marital fathers.[136] Today, the presumption is more readily rebuttable. That is one reason *R.McG.* is so significant.

Many people, like the dissenting Justice Lohr, fear that the *R.McG.* decision will have a serious adverse social impact.[137] The defendants, in their appellate brief, stated that "the cost of abstract truth is dear when contrasted with the damage to the child and his or her family. . . ."[138]

Others, such as this author, believe that the decision was legally imperative regardless of the costs, and that those costs will not be excessive. Society must always pay a price for its freedoms. The price in this instance may be the destruction of some family units. However, many of those units would be destroyed by their complicated parental situation, even without the intervention of the legal process. Also, it should not be assumed that many extra-marital fathers will use this new avenue simply because it is now open to them. Only the most persistent and concerned claiming fathers are likely to pursue an action which may destroy their own family units and will, if successful, require substantial support obligations.

R.McG. believed that the law should not protect outmoded fictions. He maintained in his appellate brief that in the past, fictional presumptions were needed for the orderly support of society's children because at that time it was impossible to prove paternity. "But to try to foist such fictions on a

134. Comment, *Paternity Testing with the Human Leukocyte Antigen System: A Medicolegal Breakthrough*, 20 SANTA CLARA LAW. 511 (1980). The HLA system was developed in 1964 at the University of California at Los Angeles (U.C.L.A.) School of Medicine, for the purpose of matching tissues precisely to minimize the possibility of organ transplant rejection. U.C.L.A. now has a large HLA paternity evaluation program, where the R.McG. tests were carried out. States were slow to recognize the new technology, but as early as 1976 the American Medical Association and American Bar Association recommended use of the HLA test. *See Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247 (1976). Since then, most states which have considered the matter have accepted HLA testing. FAM. L. REP. (BNA) 1173 (Sept. 16, 1980).

135. 615 P.2d at 671.

136. *See* note 54 *supra*.

137. 615 P.2d at 676.

138. Memorandum Brief in Support of Respondent's Motion for Summary Judgment at 9.

family in 1979," he said, "is a destructive anachronism."[139]

Every child has a right to know his or her biological heritage.[140] In addition to the obvious medical and economic considerations favoring such knowledge, many people, including the author, believe that the child has an essential right to the truth simply because it is the truth. In constitutional terms, the child has a substantive due process right to his own personhood.[141]

American society is no longer composed of neat nuclear units of biological families. Many children live with adults who are not their biological parents.[142] If children can adjust to stepfathers, adoptive fathers, live-in fathers, intermittent fathers and absent fathers, they can adjust to having two fathers, both of whom want them—a biological one with visitation rights and a "psychological" one with whom they live. If R.McG. is successful in establishing his parenthood, the child, one hopes, will be loved, supported and cared for by two fathers. Surely in today's world that is not such an adverse result.

Linda Shoemaker

139. Memorandum Brief in Opposition to Defendants' Motion for Summary Judgment at 10.

140. *In re* Adoption of Tachick, 60 Wis. 2d 540, 551, 210 N.W.2d 865, 871 (1973). Note also the increasingly militant stands taken by adult adoptees in search of their biological roots, *e.g.*, Alma Soc'y Inc. v. Mellon, 601 F.2d 1225 (2d Cir. 1979).

141. Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699, 702.

142. Many academicians have argued that the rights of the natural "biological" parent are less important than those of the "psychological" parent to whom the child is attached. Muench & Levy, *Psychological Parentage: A Natural Right*, 13 FAM. L.Q. 129 (1979).